

16B C.J.S. Constitutional Law § 1011

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

d. Sexually Oriented Content; Obscenity Restrictions

§ 1011. Restrictions on obscene content

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2180 to 2251

The government may freely restrict the publication of obscene content, but publication restrictions applicable to sexually oriented content that is not obscene are subject to the protections afforded under the First Amendment guaranty of free speech and press.

The First Amendment guaranty of freedom of speech and press does not protect obscenity, and the government may prohibit or otherwise restrict the publication of obscene materials¹ and enforce laws intended to punish or deter the publication of obscene material,² subject to the conditions on prior restraint by the government.³ A state obscenity statute may not validly punish the mere private possession of obscene matter⁴ other than child pornography.⁵

Publications that are sexually explicit, but which are not obscene, are ordinarily entitled to no less protection than other kinds of expression.⁶ Laws restricting obscene materials must not violate the guaranty of free speech and press by over-breadth in terms or application affecting sexually oriented materials that are not obscene.⁷

The First Amendment requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.⁸

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Footnotes

- 1 U.S.—*Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).
- 2 U.S.—*McKinney v. Alabama*, 424 U.S. 669, 96 S. Ct. 1189, 47 L. Ed. 2d 387 (1976); *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).
- 3 § 1015.
- 4 U.S.—*Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).
- 5 § 1013.
- 6 U.S.—*Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002); *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 1998 FED App. 0249P (6th Cir. 1998).
Ariz.—State v. Stummer, 219 Ariz. 137, 194 P.3d 1043 (2008).
- 7 U.S.—*Blount v. Rizzi*, 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008).
- 8 U.S.—*Mishkin v. State of N. Y.*, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966).

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16B C.J.S. Constitutional Law § 1012

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

d. Sexually Oriented Content; Obscenity Restrictions

§ 1012. Content as sexually explicit or obscene

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2180 to 2251

The judicial definition of an obscene publication is sufficient to remove it from the protection of the First Amendment guaranty of freedom of speech and press as distinguished from content that is sexually explicit or that depicts nudity.

A publication is obscene if, taken as a whole, it appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value.¹ Ordinarily, pornography can be banned only if obscene,² and materials which are sexually explicit, but which are not obscene, are ordinarily entitled to no less protection than other kinds of expression,³ and representations of nudity which are not obscene are protected expression.⁴

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Footnotes

¹ U.S.—[Ashcroft v. Free Speech Coalition](#), 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

- 2 U.S.—*Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).
Ariz.—*State v. Stummer*, 219 Ariz. 137, 194 P.3d 1043 (2008).
A.L.R. Library
Modern concept of obscenity, 5 A.L.R.3d 1158.
- 3 U.S.—*New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).
Ariz.—*State v. Stummer*, 219 Ariz. 137, 194 P.3d 1043 (2008).
Portrayal in art, literature, and scientific works
U.S.—*Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).
- 4 U.S.—*Orito v. Powers*, 479 F.2d 435 (7th Cir. 1973).

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16B C.J.S. Constitutional Law § 1013

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

d. Sexually Oriented Content; Obscenity Restrictions

§ 1013. Content as sexually explicit or obscene—Child pornography

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2180 to 2251

Child pornography, as a category, is not protected by the First Amendment guaranty of free speech and press regardless whether it is obscene.

Child pornography, as a category, is outside the class of material protected by the First Amendment guaranty of free speech and press and can be proscribed whether or not it is obscene under the broader definition of obscenity.¹ Published photographs featuring children engaged in sexually explicit conduct do not constitute protected expression under the First Amendment.² A state may constitutionally proscribe the possession and viewing of child pornography.³

Statutes setting forth the offenses of unlawfully dealing in child pornography and possession of child pornography do not unconstitutionally limit protected speech when they apply only to material which visually depicts a child engaging in sexual conduct, not merely material which appears to, but actually does not, depict a child engaging in sexual conduct.⁴

Federal statutes.

A federal statute criminalizes and undertakes to regulate the sexual exploitation of children, including the production of any visual depiction of sexually explicit conduct by a minor,⁵ and is not overbroad for purposes of the First Amendment.⁶ An earlier statutory ban on virtual child pornography in a federal pornography prevention act was constitutionally invalid as overbroad in that it allowed persons to be convicted in some instances when they could prove children were not exploited in the production.⁷

CUMULATIVE SUPPLEMENT

Cases:

Defendant's mistake of age was not affirmative defense to federal charge of producing child pornography, despite defendant's contention that excluding mistake-of-age evidence posed substantial risk to expression protected by First Amendment; perpetrators were well positioned to know victim's age, and any risk of chilling protected speech was significantly outweighed by government's compelling interest in protecting children from child pornography. [U.S. Const. Amend. 1](#); [18 U.S.C.A. § 2251\(a\)](#). [United States v. Tyson](#), 947 F.3d 139 (3d Cir. 2020).

Child pornography is a form of expression outside the protections of the First Amendment, and it can be constitutionally prohibited if the conduct to be prohibited is adequately defined by the applicable state law, as written or authoritatively construed. [U.S. Const. Amend. 1](#). [State v. Gray](#), 402 P.3d 254 (Wash. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Ashcroft v. Free Speech Coalition](#), 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).
[Va.—Podracky v. Com.](#), 52 Va. App. 130, 662 S.E.2d 81 (2008).
- 2 [U.S.—Ashcroft v. Free Speech Coalition](#), 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).
- 3 [U.S.—Osborne v. Ohio](#), 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990).
- 4 [Del.—Fink v. State](#), 817 A.2d 781 (Del. 2003).
- 5 [18 U.S.C.A. §§ 2251 et seq.](#)
- 6 [U.S.—U.S. v. Woods](#), 684 F.3d 1045, 88 Fed. R. Evid. Serv. 970 (11th Cir. 2012).
Proof of age requirement is reasonable
[U.S.—Connection Distributing Co. v. Holder](#), 557 F.3d 321 (6th Cir. 2009).
- 7 [U.S.—Ashcroft v. Free Speech Coalition](#), 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

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16B C.J.S. Constitutional Law § 1014

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

d. Sexually Oriented Content; Obscenity Restrictions

§ 1014. Distribution subject to regulation

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2180 to 2251

The time, place, and manner of the commercial distribution of sexually oriented content is subject to regulation or restriction within the protections afforded by the First Amendment guaranty of free speech and press.

The government can, consistent with the First Amendment guaranty of free speech, classify commercial distribution of sexually oriented materials by "adult" establishments as different from other distributions of protected speech or writing,¹ and regulate the time, place, and manner of distribution,² including regulating the location of the distribution establishments,³ the number or density of establishments in a location,⁴ and the proximity of the establishments to a school, church, or residential zone.⁵ The requirements must, however, serve a substantial governmental interest, must be the least restrictive means of regulating the distribution,⁶ and must not unreasonably limit distribution of the materials in a particular area so as to amount to improper prior restraint based on content.⁷ It must also appear that the definition applied to determine which enterprises are subject to regulation is sustainable as not overbroad.⁸

Government may require such establishments to be licensed,⁹ provided the licensing requirements do not amount to an invalid prior restraint,¹⁰ and the licensing must be narrowly tailored to serve a substantial interest of government.¹¹ The licensing scheme must provide not only the assurance of speedy access to the courts for review of adverse licensing decisions but also assurance of a speedy court decision.¹²

A state statute is overbroad and constitutionally disproportionate to its stated aim when it requires all persons intending to sell sexually explicit materials to register with the secretary of state, extending to unquestionably lawful, nonobscene, nonpornographic materials being sold to adults, when the objective is to provide a "heads-up" on the opening of "adult bookstore-type businesses."¹³

CUMULATIVE SUPPLEMENT

Cases:

Under hybrid test for judging time, place, and manner restrictions on sexually-oriented businesses, which looks to whether the regulation would completely eliminate adult entertainment, the regulation does not violate the First Amendment if: (1) the State regulated pursuant to a legitimate governmental power; (2) the regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating negative secondary effects; and (4) the regulation is designed to serve a substantial governmental interest, is narrowly tailored, and reasonable alternative avenues of communication remain available, or, alternatively, the regulation furthers an important or substantial governmental interest. [U.S. Const. Amend. 1. Doe I v. Landry, 909 F.3d 99 \(5th Cir. 2018\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 Ga.—[Airport Book Store, Inc. v. Jackson](#), 242 Ga. 214, 248 S.E.2d 623 (1978).
- 2 U.S.—[Young v. American Mini Theatres, Inc.](#), 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976); [PAO Xiong v. City of Moorhead, Minn.](#), 641 F. Supp. 2d 822 (D. Minn. 2009).
Invalid absent showing of obscenity
Ariz.—[State v. Stummer](#), 219 Ariz. 137, 194 P.3d 1043 (2008).
Insufficient to support closing hours ordinance
U.S.—[Annex Books, Inc. v. City of Indianapolis](#), 673 F. Supp. 2d 750 (S.D. Ind. 2009), *aff'd*, 624 F.3d 368 (7th Cir. 2010).
Newspaper rack exclusion not content-neutral
Cal.—[Sebago, Inc. v. City of Alameda](#), 211 Cal. App. 3d 1372, 259 Cal. Rptr. 918 (1st Dist. 1989).
A.L.R. Library
[Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Types of Businesses Regulated](#), 21 A.L.R.6th 425.
- 3 U.S.—[Young v. American Mini Theatres, Inc.](#), 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).
No requirement of commercially viable alternatives
U.S.—[PAO Xiong v. City of Moorhead, Minn.](#), 641 F. Supp. 2d 822 (D. Minn. 2009).
A.L.R. Library
[Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses](#), 10 A.L.R.5th 538.
- 4 U.S.—[Hart Book Stores, Inc. v. Edmisten](#), 612 F.2d 821 (4th Cir. 1979).
- 5 Pa.—[Kacar, Inc. v. Zoning Hearing Bd. of City of Allentown](#), 60 Pa. Commw. 582, 432 A.2d 310 (1981).
- 6 U.S.—[Purple Onion, Inc. v. Jackson](#), 511 F. Supp. 1207 (N.D. Ga. 1981).

Negative secondary effects of business

U.S.—PAO Xiong v. City of Moorhead, Minn., 641 F. Supp. 2d 822 (D. Minn. 2009).

Ariz.—State v. Stummer, 219 Ariz. 137, 194 P.3d 1043 (2008).

7 U.S.—Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981); CLR Corp. v. Henline, 520 F. Supp. 760 (W.D. Mich. 1981), judgment aff'd, 702 F.2d 637 (6th Cir. 1983).

8 U.S.—Annex Books, Inc. v. City of Indianapolis, 673 F. Supp. 2d 750 (S.D. Ind. 2009), aff'd, 624 F.3d 368 (7th Cir. 2010).

Overbroad ordinance

Cal.—Sebago, Inc. v. City of Alameda, 211 Cal. App. 3d 1372, 259 Cal. Rptr. 918 (1st Dist. 1989).

9 U.S.—City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004).

10 U.S.—Broadway Distributors, Inc. v. White, 307 F. Supp. 1180 (D. Mass. 1970).

Imprecise standards

Cal.—City of Imperial Beach v. Escott, 115 Cal. App. 3d 134, 171 Cal. Rptr. 197 (4th Dist. 1981).

Official discretion too broad

U.S.—Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980).

11 U.S.—Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980).

Total suppression or great reduction not justified

U.S.—East Side News, Inc. v. City of Geneva, Ohio, 538 F. Supp. 484 (N.D. Ohio 1981).

12 U.S.—City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004).

13 U.S.—Big Hat Books v. Prosecutors, 565 F. Supp. 2d 981 (S.D. Ind. 2008).

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16B C.J.S. Constitutional Law § 1015

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

d. Sexually Oriented Content; Obscenity Restrictions

§ 1015. Prior restraint; seizure

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2180 to 2251

The First Amendment guaranty of free speech and press requires procedural safeguards to prevent substantial interference with materials which are not obscene when a regulatory method amounts to a prior restraint on the sale or distribution of sexually explicit content.

The First Amendment guaranty of free speech and press requires procedural safeguards to prevent substantial interference with materials which are not obscene when a regulatory method amounts to a prior restraint on sale or distribution.¹ To avoid constitutional infirmity, a scheme of administrative censorship must place on the censor the burden of initiating judicial review and of proving that the material is unprotected expression; require prompt judicial review to prevent the administrative decision of the censor from achieving the effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination.²

Proceedings for judicial orders enjoining the sale of allegedly obscene materials should not impose a final restraint until there has been a judicial determination that the matter is obscene in an adversary proceeding.³

Seizure of materials.

Freedom of speech and press is violated when a seizure of allegedly obscene material amounts to a substantial restraint of distribution of the material and there is no prior judicial determination whether the material is obscene, and no provision for a prompt determination in an adversary proceeding after the seizure.⁴ An exception applies as to obscene material seized with the proceeds of racketeering without having first been adjudged obscene,⁵ and the forfeiture of nonobscene materials in a RICO forfeiture proceeding for obscenity does not have a proscribed unconstitutional chilling effect on a person's right of expression.⁶

When allegedly obscene material is seized pursuant to a warrant in order to preserve it for use as evidence in a later proceeding, there is no absolute right to a prior adversary hearing.⁷ When a seizure of materials as evidence substantially inhibits distribution, because the distributor has insufficient copies, copying of the seized material must be permitted, or it must be returned.⁸

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Footnotes

- 1 U.S.—*McKinney v. Alabama*, 424 U.S. 669, 96 S. Ct. 1189, 47 L. Ed. 2d 387 (1976).
- 2 U.S.—*Blount v. Rizzi*, 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971).
- 3 U.S.—*Penthouse Intern., Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).
N.Y.—*Cosgrove v. Cloud Books, Inc.*, 83 A.D.2d 789, 443 N.Y.S.2d 450 (4th Dep't 1981).
Pa.—*Brightbill v. Rigo, Inc.*, 274 Pa. Super. 315, 418 A.2d 424 (1980).
- 4 U.S.—*Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964).
Violation by pretrial seizure without probable cause
U.S.—*Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989).
Presumptively protected when seized
U.S.—*Multi-Media Distributing Co., Inc. v. U.S.*, 836 F. Supp. 606 (N.D. Ind. 1993).
- 5 U.S.—*Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980).
- 6 U.S.—*U.S. v. Pryba*, 900 F.2d 748, 30 Fed. R. Evid. Serv. 439 (4th Cir. 1990).
- 7 U.S.—*Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973).
- 8 U.S.—*Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973).

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16B C.J.S. Constitutional Law § 1016

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

5. Entertainment or Performance

a. General Considerations

§ 1016. Entertainment protected as speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1885, 1890, 1891, 1892

Entertainment, like political and ideological speech, or the news, is protected by the First Amendment guaranty of free speech and press.

Like political and ideological speech, or the news, entertainment is protected by the First Amendment guaranty of free speech and press,¹ including live performances;² films or motion pictures;³ recorded, broadcast, or transmitted communications via radio, television, or video;⁴ and the Internet.⁵ Protected expression need not constitute the reasoned discussion of public affairs but may also be for purposes of entertainment.⁶ Speech that entertains, like speech that informs, is protected because the line between the informing and the entertaining is too elusive for the protection of the basic right to free speech.⁷ As the Supreme Court observed, it is difficult to distinguish politics from entertainment and dangerous to try.⁸

The First Amendment provides greater protection to works of artistic expression than it provides to pure commercial speech.⁹ The application of the First Amendment protections to speech by entertainment reflects the constitutional principle that esthetic

and moral judgments about art are for the individual to make, not for the government to decree, even with the mandate or approval of a majority.¹⁰

Generally, entertainment protected as speech must communicate some element of information or some idea, as may be inferred from the circumstances,¹¹ but media that are inherently expressive do not permit an inquiry into whether a particularized message is conveyed.¹² Constitutional protection in an entertainment context does not require an intent to convey a particularized message.¹³

CUMULATIVE SUPPLEMENT

Cases:

Speech remains protected even when it may stir people to action, move them to tears, or inflict great pain. *U.S.C.A. Const.Amend. 1. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

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Footnotes

- 1 U.S.—*Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981); *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007); *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009).
Cal.—*Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 105 Cal. Rptr. 3d 98 (1st Dist. 2010), as modified on other grounds on denial of reh'g, (Feb. 24, 2010).
Colo.—*Curious Theater Co. v. Colorado Dept. of Public Health and Environment*, 216 P.3d 71 (Colo. App. 2008), judgment aff'd, 220 P.3d 544 (Colo. 2009).
- 2 §§ 1017 to 1022.
- 3 §§ 1023 to 1025.
- 4 §§ 1031 to 1039.
- 5 §§ 1040 to 1043.
- 6 U.S.—*James v. Meow Media, Inc.*, 300 F.3d 683, 169 Ed. Law Rep. 30, 2002 FED App. 0270P (6th Cir. 2002) (referencing, as general authority, *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967)).
- 7 U.S.—*C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).
- 8 U.S.—*Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).
- 9 U.S.—*Nichols v. Moore*, 334 F. Supp. 2d 944 (E.D. Mich. 2004).
- 10 U.S.—*U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).
- 11 U.S.—*Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386, 83 Ed. Law Rep. 43 (4th Cir. 1993).
Colo.—*Curious Theater Co. v. Colorado Dept. of Public Health and Environment*, 216 P.3d 71 (Colo. App. 2008), judgment aff'd, 220 P.3d 544 (Colo. 2009).
Ill.—*O'Donnell v. City of Chicago*, 363 Ill. App. 3d 98, 299 Ill. Dec. 469, 842 N.E.2d 208 (1st Dist. 2005).
- 12 U.S.—*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).
Tex.—*Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014).

13

U.S.—*Cockrel v. Shelby County School Dist.*, 270 F.3d 1036, 158 Ed. Law Rep. 551, 2001 FED App. 0396P (6th Cir. 2001).

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16B C.J.S. Constitutional Law § 1017

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

5. Entertainment or Performance

b. Live Entertainment or Performances

§ 1017. Athletics or sporting events and games

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1897, 1901

Live-performance athletic or sports events or games, or gambling, generally do not involve protected expressive conduct under the First Amendment but special circumstances may require protection; fortunetelling and other predictive arts are generally protected.

Live-performance athletics or sports events generally do not involve expressive conduct within the protection of the First Amendment guaranty of free speech,¹ as applied to professional baseball,² professional boxing,³ professional mixed martial arts,⁴ professional wrestling,⁵ or cockfighting.⁶ The principle also applies to poker tournaments⁷ or other forms of gambling games, such as bingo,⁸ pinball, black jack, and slot machines.⁹

In contrast, the particular character of a sporting event, and the identity of the particular participants in a sporting event, may involve acts of political expression under particular circumstances, warranting protection from a prior restraint, as applied to a state governor's attempt to enjoin and cancel a rugby match involving a South African team and American players.¹⁰

Fortunetelling.

Fortunetelling, whether as entertainment or to convey information shedding light on future events, is protected speech, not limited as mere commercial speech, and is not subject to restriction in order to combat fraud when the applicable law is not sufficiently narrowly tailored to that end.¹¹

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Footnotes

- 1 U.S.—[Jones v. Schneiderman](#), 974 F. Supp. 2d 322 (S.D. N.Y. 2013).
Not pure or symbolic speech
Fla.—[Top Rank, Inc. v. Florida State Boxing Com'n](#), 837 So. 2d 496 (Fla. 1st DCA 2003).
- 2 U.S.—[James v. City of Long Beach](#), 18 F. Supp. 2d 1078 (C.D. Cal. 1998).
- 3 Fla.—[Top Rank, Inc. v. Florida State Boxing Com'n](#), 837 So. 2d 496 (Fla. 1st DCA 2003).
- 4 U.S.—[Jones v. Schneiderman](#), 974 F. Supp. 2d 322 (S.D. N.Y. 2013).
- 5 U.S.—[Murdock v. City of Jacksonville, Fla.](#), 361 F. Supp. 1083 (M.D. Fla. 1973).
- 6 Okla.—[Edmondson v. Pearce](#), 2004 OK 23, 91 P.3d 605 (Okla. 2004), as corrected on other grounds, (July 28, 2004).
- 7 U.S.—[AK Tournament Play, Inc. v. Town of Wallkill](#), 444 Fed. Appx. 475 (2d Cir. 2011).
- 8 U.S.—[There to Care, Inc. v. Commissioner of Indiana Dept. of Revenue](#), 19 F.3d 1165 (7th Cir. 1994); [Allendale Leasing, Inc. v. Stone](#), 614 F. Supp. 1440 (D.R.I. 1985), judgment aff'd, 788 F.2d 830 (1st Cir. 1986).
Ill.—[O'Donnell v. City of Chicago](#), 363 Ill. App. 3d 98, 299 Ill. Dec. 469, 842 N.E.2d 208 (1st Dist. 2005).
Ill.—[O'Donnell v. City of Chicago](#), 363 Ill. App. 3d 98, 299 Ill. Dec. 469, 842 N.E.2d 208 (1st Dist. 2005).
- 9 U.S.—[Selfridge v. Carey](#), 522 F. Supp. 693 (N.D. N.Y. 1981).
- 10 U.S.—[Nefedro v. Montgomery County](#), 414 Md. 585, 996 A.2d 850 (2010).
- 11 **No compelling interest shown**
U.S.—[Trimble v. City of New Iberia](#), 73 F. Supp. 2d 659 (W.D. La. 1999).
Clairvoyancy and fortunetelling protected
U.S.—[Argello v. City of Lincoln](#), 143 F.3d 1152 (8th Cir. 1998).
Tarot card readings protected
U.S.—[Krafchow v. Town of Woodstock](#), 62 F. Supp. 2d 698 (N.D. N.Y. 1999).
Astrology and predictive arts protected
U.S.—[Rushman v. City of Milwaukee](#), 959 F. Supp. 1040 (E.D. Wis. 1997).

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16B C.J.S. Constitutional Law § 1018

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

5. Entertainment or Performance

b. Live Entertainment or Performances

§ 1018. Plays, shows, and theatrical entertainment

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1890, 1891

The performance of a play or show, or live theatrical production, is within the protection of the First Amendment guaranty of free speech.

The live performance of a play or show¹ or live theatrical production is within the protection of the First Amendment guaranty of free speech.² An actor in a stage performance enjoys a constitutional right to freedom of speech, including the right to criticize the government openly during a dramatic performance.³

Stage play productions are inherently expressive and do not require the intent to convey a particularized message in order to warrant constitutional protection.⁴ Stage productions may not be dissected into speech and nonspeech components for the purpose of determining limitations on First Amendment freedoms; such productions are a unitary form of constitutionally protected expression.⁵ Even live crude street skits come within the First Amendment's reach.⁶

While ballet and theatre performances receive greater First Amendment protection than nude dancing,⁷ plays, shows, or other theatrical performances are not subject to regulation or restriction solely because they involve nudity or consist of adult entertainment,⁸ but the First Amendment does not protect obscene performances.⁹ Statutes which authorize closing night clubs in which prostitution and lewd conduct take place do not violate First Amendment rights.¹⁰

A conditional use permit requirement for indoor theaters in a commercial zoning area is a prior restraint prohibited by the First Amendment when it lacks narrow, objective standards for the issuance of the permits in order to determine whether the licensor is discriminating against disfavored speech.¹¹

A content-neutral ban on smoking cigarettes as applied to on-stage smoking in a theatrical production is sufficiently narrowly tailored to withstand a First Amendment challenge, given the State's legitimate interest in protecting nonsmokers from involuntary exposure to environmental tobacco smoke and given the simulative alternatives available to the play producers.¹²

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Footnotes

- 1 U.S.—*Showtime Entertainment, LLC v. Town of Mendon*, 769 F.3d 61 (1st Cir. 2014); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386, 83 Ed. Law Rep. 43 (4th Cir. 1993).
Neb.—*Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001).
Production of "Hair"
U.S.—*Southeastern Promotions, Limited v. City of Mobile, Ala.*, 457 F.2d 340 (5th Cir. 1972).
- 2 U.S.—*Schacht v. U.S.*, 398 U.S. 58, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (1970); *Southeastern Promotions, Limited v. City of Atlanta, Ga.*, 334 F. Supp. 634 (N.D. Ga. 1971).
- 3 U.S.—*Schacht v. U.S.*, 398 U.S. 58, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (1970).
- 4 U.S.—*Cockrel v. Shelby County School Dist.*, 270 F.3d 1036, 158 Ed. Law Rep. 551, 2001 FED App. 0396P (6th Cir. 2001).
- 5 U.S.—*Southeastern Promotions, Limited v. City of Atlanta, Ga.*, 334 F. Supp. 634 (N.D. Ga. 1971).
- 6 U.S.—*IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386, 83 Ed. Law Rep. 43 (4th Cir. 1993).
- 7 U.S.—*Ways v. City of Lincoln, Neb.*, 274 F.3d 514 (8th Cir. 2001).
- 8 U.S.—*Showtime Entertainment, LLC v. Town of Mendon*, 769 F.3d 61 (1st Cir. 2014).
Nudity in play protected
U.S.—*Southeastern Promotions, Limited v. City of Atlanta, Ga.*, 334 F. Supp. 634 (N.D. Ga. 1971).
Ban on sexual contact overbroad
U.S.—*Ways v. City of Lincoln, Neb.*, 274 F.3d 514 (8th Cir. 2001).
A.L.R. Library
Validity of Statutes and Ordinances Regulating the Operation of Sexually Oriented Businesses—Nature of Regulation, 23 A.L.R.6th 573.
Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Types of Businesses Regulated, 21 A.L.R.6th 425.
- 9 Cal.—*Barrows v. Municipal Court*, 1 Cal. 3d 821, 83 Cal. Rptr. 819, 464 P.2d 483 (1970).
La.—*Spear v. State*, 358 So. 2d 918 (La. 1978).
Wash.—*City of Seattle v. Marshall*, 83 Wash. 2d 665, 521 P.2d 693 (1974).
- 10 Ala.—*Flamingo Club of Dothan, Inc. v. State ex rel. Sorrells*, 387 So. 2d 132 (Ala. 1980).
Cal.—*People ex rel. Sorenson v. Randolph*, 99 Cal. App. 3d 183, 160 Cal. Rptr. 69 (1st Dist. 1979).
- 11 U.S.—*Kraimer v. City of Schofield*, 342 F. Supp. 2d 807 (W.D. Wis. 2004).
- 12 Colo.—*Curious Theatre Co. v. Colorado Dept. of Public Health and Environment*, 220 P.3d 544 (Colo. 2009).

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16B C.J.S. Constitutional Law § 1019

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

5. Entertainment or Performance

b. Live Entertainment or Performances

§ 1019. Musical productions and concerts

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1891, 1894, 1895

Live musical entertainment falls within the protection of the First Amendment guaranty of free speech.

Live musical entertainment falls within the protection of the First Amendment guaranty of free speech,¹ regardless whether the music is performed² or the production is staged for profit,³ but reasonable time, place, and manner restraints may be imposed provided they are content-neutral, narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication.⁴

The denial of a rock musical's application to use a municipal auditorium because the production would not be in the best interest of the community constitutes an invalid prior restraint for First Amendment purposes.⁵ In contrast, the revocation of a concert promoter's temporary use permit to conduct a music festival on a farm site venue is not a denial of the promoter's First Amendment rights when based on actual complaints of noise having no connection to the content of the music provided the

applicable regulation is content-neutral as predicated on the government's significant interests in regulating land use for safety, health, and environmental concerns, and the revocation of the permit is rationally related to those interests.⁶

A regulation requiring permits for musical street performers in a city's public areas is invalid if not sufficiently narrowly tailored to meet the standard for a valid time, place, and manner regulation of speech when the regulation does not promote the city's asserted interests which can be achieved by less intrusive measures.⁷

A preliminary injunction limiting musical performances at particular leased premises to string instruments violated the First Amendment rights of the instrumental music performers to freedom of expression since the city's noise regulations limited the permissible volume of sound without regard to instruments used.⁸

The content-neutral regulation of sound amplification in the context of live musical performances in a public place is permissible provided the tests of reasonableness, narrow tailoring, and significant interests are satisfied.⁹ A ban on the amplification of live music performances at a musical venue, applicable to both vocal and instrumental music, is a First Amendment violation, even when the ban is content-neutral and predicated on the city's interests in noise reduction in the vicinity, if the ban is substantially broader than necessary to achieve the interest which could be achieved without the restriction.¹⁰

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Footnotes

- 1 U.S.—*Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981); *Collins v. Ainsworth*, 382 F.3d 529 (5th Cir. 2004); *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009).
- 2 U.S.—*Pence v. City of St. Louis, Mo.*, 958 F. Supp. 2d 1079 (E.D. Mo. 2013).
- 3 U.S.—*Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984).
Ohio—*State ex rel. Pizza v. Tom S. A. Inc.*, 68 Ohio Misc. 19, 22 Ohio Op. 3d 309, 428 N.E.2d 878 (C.P. 1981).
- 4 U.S.—*Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); *Casey v. City of Newport, R.I.*, 308 F.3d 106 (1st Cir. 2002); *Ihnken v. Gardner*, 927 F. Supp. 2d 227 (D. Md. 2013); *Genco Importing Inc. v. City of New York*, 552 F. Supp. 2d 371 (S.D. N.Y. 2008).
Roadblocks and flyovers not violations
U.S.—*Howard v. Town of Bethel*, 481 F. Supp. 2d 295 (S.D. N.Y. 2007).
- 5 U.S.—*Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).
- 6 U.S.—*Ihnken v. Gardner*, 927 F. Supp. 2d 227 (D. Md. 2013).
- 7 U.S.—*Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009); *Pence v. City of St. Louis, Mo.*, 958 F. Supp. 2d 1079 (E.D. Mo. 2013).
- 8 N.Y.—*Morris v. 702 East Fifth Street HDLC*, 8 A.D.3d 27, 778 N.Y.S.2d 20 (1st Dep't 2004).
- 9 U.S.—*Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).
- 10 U.S.—*Casey v. City of Newport, R.I.*, 308 F.3d 106 (1st Cir. 2002).

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16B C.J.S. Constitutional Law § 1020

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

5. Entertainment or Performance

b. Live Entertainment or Performances

§ 1020. Dance performances

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1896

Live dance performance is a form of expression protected by the First Amendment guaranty of free speech and expression, subject to restrictions applicable to nude or topless dancing in particular circumstances.

Dance is a form of expression protected by the First Amendment guaranty of free speech and expression¹ and may not be banned solely on grounds of nudity,² partial nudity,³ or topless dancing.⁴

Governmental regulation or prohibition of topless dancing is a valid regulation of conduct under appropriate conditions,⁵ such as the regulation of nude dancing⁶ or topless dancing combined with physical touching,⁷ provided the regulation relies on an evidentiary foundation to the effect that undesirable secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.⁸

A statute may validly require nude dancers in adult entertainment establishments to wear pasties and a G-string.⁹

CUMULATIVE SUPPLEMENT

Cases:

Regulating the harmful secondary effects of erotic dancing, which can include the impacts on public health, safety, and welfare, is a substantial governmental interest, for purposes of First Amendment free speech challenge to restrictions on sexually-oriented businesses. [U.S. Const. Amend. 1](#). *Doe I v. Landry*, 905 F.3d 290 (5th Cir. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Abusaid v. Hillsborough County Bd. of County Com'rs](#), 637 F. Supp. 2d 1002 (M.D. Fla. 2007).
[Mass.—Mendoza v. Licensing Board of Fall River](#), 444 Mass. 188, 827 N.E.2d 180 (2005).
[N.D.—McCrothers Corp. v. City of Mandan](#), 2007 ND 28, 728 N.W.2d 124 (N.D. 2007).
[Ohio—34 N. Jefferson, L.L.C. v. Liquor Control Comm.](#), 2012-Ohio-3231, 974 N.E.2d 774 (Ohio Ct. App. 10th Dist. Franklin County 2012).
- 2 [U.S.—City of Erie v. Pap's A.M.](#), 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); [Barnes v. Glen Theatre, Inc.](#), 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991); [White River Amusement Pub, Inc. v. Town of Hartford](#), 481 F.3d 163 (2d Cir. 2007).
[Mass.—Mendoza v. Licensing Board of Fall River](#), 444 Mass. 188, 827 N.E.2d 180 (2005).
 As to regulations predicated on the sale of alcoholic beverages, see § 1022.
Outer ambit of protection
[Ohio—34 N. Jefferson, L.L.C. v. Liquor Control Comm.](#), 2012-Ohio-3231, 974 N.E.2d 774 (Ohio Ct. App. 10th Dist. Franklin County 2012).
- 3 [N.D.—McCrothers Corp. v. City of Mandan](#), 2007 ND 28, 728 N.W.2d 124 (N.D. 2007).
- 4 [U.S.—Chase v. Davelaar](#), 645 F.2d 735 (9th Cir. 1981).
[Alaska—Mickens v. City of Kodiak](#), 640 P.2d 818 (Alaska 1982).
[N.Y.—Bellanca v. New York State Liquor Authority](#), 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1981).
- 5 [U.S.—Paladino v. City of Omaha](#), 335 F. Supp. 897 (D. Neb. 1972), judgment aff'd, 471 F.2d 812 (8th Cir. 1972).
[N.Y.—Bellanca v. New York State Liquor Authority](#), 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1981).
- 6 [Ky.—Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government](#), 60 S.W.3d 572 (Ky. Ct. App. 2001).
- 7 [S.C.—State v. Bouye](#), 325 S.C. 260, 484 S.E.2d 461 (1997).
- 8 [U.S.—City of Erie v. Pap's A.M.](#), 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000).
Secondary effects of nude dancing
[U.S.—Steiner v. County Com'rs of Caroline County](#), 490 F. Supp. 2d 617 (D. Md. 2007), judgment aff'd, 341 Fed. Appx. 918 (4th Cir. 2009).
[Ky.—Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government](#), 60 S.W.3d 572 (Ky. Ct. App. 2001).
- 9 [U.S.—Barnes v. Glen Theatre, Inc.](#), 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).
Prohibition of nudity in business or commercial establishment
[Neb.—Village of Winslow v. Sheets](#), 261 Neb. 203, 622 N.W.2d 595 (2001).

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16B C.J.S. Constitutional Law § 1021

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

5. Entertainment or Performance

b. Live Entertainment or Performances

§ 1021. Adult or sexually oriented entertainment

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1855, 1886, 1888, 1890, 1891

Adult or sexually oriented entertainment is within the protection of the First Amendment guaranty of free speech and expression, but regulation and licensing is valid within standards of reasonable time, place, and manner restrictions, narrowly tailored to legitimate government interests.

Adult or sexually oriented entertainment is within the protection of the First Amendment guaranty of free speech and expression,¹ including nudity or simulated sexual conduct,² or sexual contact.³

The regulation and licensing of adult entertainment activities may be constitutionally valid provided it is content-neutral, serves a governmental interest unrelated to the suppression of speech, and imposes reasonable time, place, and manner restrictions narrowly tailored.⁴ An ordinance banning all public nudity, regardless whether accompanied by expressive activity, is a valid content-neutral regulation aimed at combating crime and other secondary effects caused by the presence of adult entertainment establishments.⁵

Adult entertainment zoning is an example of a statute in which, under the First Amendment, the value of free speech and public debate must be balanced against the arguably artistic value of some erotic material; because such ordinances limit the expressive activity and do not ban it entirely, they are appropriately analyzed as time, place, and manner regulations.⁶ A prohibition of actual sexual conduct or contact will also fail when overbroad in its defining terms and in the absence of a limitation excluding artistic expression or venues.⁷ The test for the constitutionality of a municipality's dispersal ordinance relating to adult businesses requires the court to determine: (1) whether the ordinance is a complete ban on protected expression; (2) whether the municipality's purpose in enacting the provision is the amelioration of secondary effects; and, if so; (3) whether the provision is designed to serve a substantial government interest, and whether reasonable alternative avenues of communication remain available.⁸ The test for the validity of zoning ordinance, challenged under the First Amendment, looking to whether it leaves reasonable means of commercial adult activity as an alternative to its restrictions, involves multiple factors, including the percentage of acreage within the zone for adult business use compared with the acreage available to commercial enterprises and the number of sites available to adult entertainment businesses, with no single dispositive evaluative consideration.⁹

Ordinances have validly prohibited adult entertainment activities in close proximity to a residential zone,¹⁰ a church, a school, or a licensed day care center.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Definition of "adult entertainment" contained in county zoning ordinance restricting adult entertainment businesses, as "any exhibition, performance or dance of any type" involving a person who was unclothed, whose clothing exposed specified portions of the body, or who engaged in specified physical conduct, "with the intent to sexually arouse or excite another person," was not overbroad in violation of First Amendment; adult entertainment business challenging ordinance failed to show that ordinance reached a substantial number of impermissible applications, that is, that there was a "realistic danger" that it reached mainstream musical, artistic, or theatrical entertainment, and county's proposed reading of intent clause, to require that the primary purpose of the entertainment act be to sexually arouse or excite another person, was a "readily susceptible" limiting construction that further reduced fear of impermissible applications. [U.S. Const. Amend. 1. Nico Enterprises, Inc. v. Prince George's County, Maryland](#), 186 F. Supp. 3d 489 (D. Md. 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Schad v. Borough of Mount Ephraim](#), 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981); [Showtime Entertainment, LLC v. Town of Mendon](#), 769 F.3d 61 (1st Cir. 2014); [Lund v. City of Fall River, MA](#), 714 F.3d 65 (1st Cir. 2013); [Alameda Books, Inc. v. City of Los Angeles](#), 631 F.3d 1031 (9th Cir. 2011). [Mass.—Mendoza v. Licensing Board of Fall River](#), 444 Mass. 188, 827 N.E.2d 180 (2005). [Tenn.—City of Knoxville v. Entertainment Resources, LLC](#), 166 S.W.3d 650 (Tenn. 2005). [Tex.—Smartt v. City of Laredo](#), 239 S.W.3d 869 (Tex. App. Amarillo 2007).
A.L.R. Library
[Validity of Statutes and Ordinances Regulating the Operation of Sexually Oriented Businesses—Nature of Regulation](#), 23 A.L.R.6th 573.
[Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Types of Businesses Regulated](#), 21 A.L.R.6th 425.

Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Legal Issues and Principles, 20 A.L.R.6th 161.

What Constitutes "Public Place" Within Meaning of State Statute or Local Ordinance Prohibiting Indecency or Commission of Sexual Act in Public Place, 95 A.L.R.5th 229.

Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses, 10 A.L.R.5th 538.

2 U.S.—Ways v. City of Lincoln, Neb., 274 F.3d 514 (8th Cir. 2001); Dolls, Inc. v. City of Coralville, Iowa, 425 F. Supp. 2d 958 (S.D. Iowa 2006).

3 U.S.—Ways v. City of Lincoln, Neb., 274 F.3d 514 (8th Cir. 2001).

4 U.S.—Alameda Books, Inc. v. City of Los Angeles, 631 F.3d 1031 (9th Cir. 2011).

Tex.—Smartt v. City of Laredo, 239 S.W.3d 869 (Tex. App. Amarillo 2007).

As to regulations predicated on the sale of alcoholic beverages, see § 1022.

Requires countervailing government interests

U.S.—Showtime Entertainment, LLC v. Town of Mendon, 769 F.3d 61 (1st Cir. 2014).

5 U.S.—City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000).

6 N.J.—Borough of Sayreville v. 35 Club L.L.C., 208 N.J. 491, 33 A.3d 1200 (2012).

7 U.S.—Ways v. City of Lincoln, Neb., 274 F.3d 514 (8th Cir. 2001).

8 U.S.—Alameda Books, Inc. v. City of Los Angeles, 631 F.3d 1031 (9th Cir. 2011).

Tex.—Smartt v. City of Laredo, 239 S.W.3d 869 (Tex. App. Amarillo 2007).

Location restriction invalid as vague

Tenn.—City of Knoxville v. Entertainment Resources, LLC, 166 S.W.3d 650 (Tenn. 2005).

Valid enforcement discretion not unfettered

Tex.—8100 North Freeway, Ltd. v. City of Houston, 363 S.W.3d 849 (Tex. App. Houston 14th Dist. 2012).

9 U.S.—Lund v. City of Fall River, MA, 714 F.3d 65 (1st Cir. 2013).

10 Tex.—Smartt v. City of Laredo, 239 S.W.3d 869 (Tex. App. Amarillo 2007).

11 U.S.—SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988); International Eateries of America, Inc. v. Broward County, 726 F. Supp. 1556 (S.D. Fla. 1987).

16B C.J.S. Constitutional Law § 1022

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

5. Entertainment or Performance

b. Live Entertainment or Performances

§ 1022. Alcoholic beverage sale regulations

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑1886

The government's authority to regulate the sale of alcoholic beverages in licensed establishments may permit prohibiting live entertainment, and specifically sexually explicit or nude entertainment, as prohibiting the sale of liquor and not the performances themselves, but the restrictions must not be overbroad in reaching protected speech in violation of the First Amendment guaranty of free speech.

The government's authority to regulate the sale of alcoholic beverages in licensed establishments may permit prohibiting sexually explicit entertainment at the licensed establishment¹ provided the regulations are a reasonable exercise of a state's Twenty-First Amendment authority, are rationally related to the furtherance of legitimate state interests,² and are not overbroad.³

An entertainment restriction based on alcohol regulation may not validly act as a prior restraint on speech by prohibiting music, dancing, or entertainment without restriction until permission is granted by a license or permit even if the stated goal of the

restriction is unrelated to the suppression of speech.⁴ Banning a particular type of music in establishments that serve liquor is not a de minimis restriction on freedom of expression for constitutional purposes.⁵

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Footnotes

- 1 U.S.—*City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 107 S. Ct. 383, 93 L. Ed. 2d 334 (1986); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357 (1981).
- 2 U.S.—*Walker v. City of Kansas City, Mo.*, 911 F.2d 80 (8th Cir. 1990).
Criteria for validity
Ill.—*City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 309 Ill. Dec. 770, 865 N.E.2d 133 (2006).
- 3 U.S.—*Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074 (4th Cir. 2006).
Ill.—*City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 309 Ill. Dec. 770, 865 N.E.2d 133 (2006).
Me.—*City of Bangor v. Diva's, Inc.*, 2003 ME 51, 830 A.2d 898 (Me. 2003).
Statute providing for revocation of liquor licenses for nudity or sexual behavior ruled overly broad
U.S.—*Legend Night Club v. Miller*, 637 F.3d 291 (4th Cir. 2011).
- 4 U.S.—*Jersey's All-American Sports Bar, Inc. v. Washington State Liquor Control Bd.*, 55 F. Supp. 2d 1131 (W.D. Wash. 1999).
- 5 U.S.—*Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983).

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16B C.J.S. Constitutional Law § 1023

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

6. Films, Motion Pictures, or Videos

a. General Considerations

§ 1023. Films, motion pictures, or videos as protected speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1892

Films, motion pictures, or video recordings are within the basic protection of the First Amendment guaranty of free speech and press.

The basic protection of the First Amendment guaranty of free speech and press encompasses films, motion pictures,¹ and video recordings,² extending as well to the activities of creating,³ performing for,⁴ filming,⁵ distributing or disseminating,⁶ exhibiting,⁷ or viewing.⁸ The constitutional significance of free expression by means of motion pictures is not diminished by the fact that they are produced and sold for profit⁹ or that they are designed to entertain as well as inform.¹⁰

The First Amendment does not require absolute freedom to exhibit every motion picture of every kind at all times and all places.¹¹ The applicable constitutional standard for the content-based regulation or restriction of motion pictures or videos is one of strict scrutiny for service of a compelling government interest, narrowly tailored to the interest served.¹² The standard

applicable to viewpoint based restrictions is also one of strict scrutiny for compelling government interests and narrow tailoring to effectuate those interests.¹³

Any restriction on the dissemination of motion pictures must be carefully tailored in order to ensure the full protection of First Amendment rights¹⁴ and will not survive vagueness.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Making unauthorized and secret video recordings of secondary-school classes does not represent a recognized First Amendment right, nor does the public dissemination of the video. [U.S. Const. Amend. 1. Brinsdon v. McAllen Independent School District](#), 863 F.3d 338 (5th Cir. 2017), as revised, (July 3, 2017).

Texas Film Commission's denial of grant under incentive program established to promote development of film, television, and multimedia industries in Texas, to film production company seeking to produce film in Texas, based on alleged content of film, which allegedly portrayed Texas and Texans in negative light, did not violate provision of Texas Constitution protecting freedom of speech, since denial of grant did not forbid company from filming, producing, or releasing film, but merely did not subsidize film with Texas taxpayer funds. [Vernon's Ann. Texas Const. Art. 1, § 8](#); [V.T.C.A., Government Code § 485.022\(a\). Machete Productions, L.L.C. v. Page](#), 809 F.3d 281 (5th Cir. 2015).

Motion pictures are a significant medium for the communication of ideas under the free speech clause of the First Amendment; they can affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. [U.S. Const. Amend. 1. Telescope Media Group v. Lucero](#), 936 F.3d 740 (8th Cir. 2019).

Idaho Statute prohibiting a person from entering a private agricultural production facility and, without express consent from the facility owner, making audio or video recordings of the conduct of an agricultural production facility's operations, was content based regulation on speech, and thus would comply with First Amendment only if it withstood strict scrutiny; statute defined regulated speech by particular subject matter, and its application explicitly pivoted on content of the recordings. [U.S. Const. Amend. 1; Idaho Code Ann. § 18-7042\(1\)\(d\). Animal Legal Defense Fund v. Wasden](#), 878 F.3d 1184 (9th Cir. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Interstate Circuit, Inc. v. City of Dallas](#), 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968); [Kingsley Intern. Pictures Corp. v. Regents of University of State of N.Y.](#), 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959); [Joseph Burstyn, Inc. v. Wilson](#), 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952); [James v. Meow Media, Inc.](#), 300 F.3d 683, 169 Ed. Law Rep. 30, 2002 FED App. 0270P (6th Cir. 2002); [Church on the Rock v. City of Albuquerque](#), 84 F.3d 1273 (10th Cir. 1996).
Fla.—[Tyne v. Time Warner Entertainment Co., L.P.](#), 901 So. 2d 802 (Fla. 2005).
N.H.—[Doyle v. Commissioner, New Hampshire Dept. of Resources and Economic Development](#), 163 N.H. 215, 37 A.3d 343 (2012).
- 2 U.S.—[U.S. v. Stevens](#), 533 F.3d 218 (3d Cir. 2008), *aff'd*, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); [U.S. Sound & Service, Inc. v. Township of Brick](#), 126 F.3d 555 (3d Cir. 1997).
Ill.—[People v. Williams](#), 235 Ill. 2d 178, 336 Ill. Dec. 237, 920 N.E.2d 446 (2009).

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- 3 N.H.—*State v. Theriault*, 158 N.H. 123, 960 A.2d 687 (2008).
Tex.—*Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014).
- 4 N.H.—*State v. Theriault*, 158 N.H. 123, 960 A.2d 687 (2008).
Tex.—*Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014).
- 5 U.S.—*Vivid Entertainment, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013).
N.H.—*State v. Theriault*, 158 N.H. 123, 960 A.2d 687 (2008).
- 6 U.S.—*Vivid Entertainment, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013).
N.H.—*Doyle v. Commissioner, New Hampshire Dept. of Resources and Economic Development*, 163 N.H. 215, 37 A.3d 343 (2012).
- 7 U.S.—*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952); *U.S. Sound & Service, Inc. v. Township of Brick*, 126 F.3d 555 (3d Cir. 1997).
Ill.—*People v. Williams*, 235 Ill. 2d 178, 336 Ill. Dec. 237, 920 N.E.2d 446 (2009).
N.H.—*State v. Theriault*, 158 N.H. 123, 960 A.2d 687 (2008).
- 8 U.S.—*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952); *Pratt v. Independent School Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771, 2 Ed. Law Rep. 990, 64 A.L.R. Fed. 757 (8th Cir. 1982); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996).
Kan.—*DPR, Inc. v. City of Pittsburg*, 24 Kan. App. 2d 703, 953 P.2d 231 (1998).
- 9 **Movies shown in coin-operated machines**
U.S.—*Exotic World News of Appleton, Inc. v. City of Appleton*, 482 F. Supp. 1220 (E.D. Wis. 1980).
- 10 Cal.—*EWAP, Inc. v. City of Los Angeles*, 97 Cal. App. 3d 179, 158 Cal. Rptr. 579 (2d Dist. 1979).
- 11 U.S.—*U.S. v. Craighead*, 539 F.3d 1073 (9th Cir. 2008).
- 12 U.S.—*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952).
- 13 N.H.—*State v. Theriault*, 158 N.H. 123, 960 A.2d 687 (2008).
- 14 U.S.—*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952); *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973).
- 15 U.S.—*U.S. v. Stevens*, 533 F.3d 218 (3d Cir. 2008), *aff'd*, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).
- U.S.—*Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996).
- U.S.—*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968); *U.S. Sound & Service, Inc. v. Township of Brick*, 126 F.3d 555 (3d Cir. 1997).
- Cal.—*People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater*, 118 Cal. App. 3d 863, 173 Cal. Rptr. 476 (4th Dist. 1981).
- U.S.—*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

6. Films, Motion Pictures, or Videos

a. General Considerations

§ 1024. Films and video recordings; sexually oriented content or obscenity

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1892, 2225 to 2228

Films, motion pictures, or video recordings, including sexually oriented films, while within the basic protection of the First Amendment guaranty of free speech and expression, are subject to regulation or restriction on grounds of obscenity.

The First Amendment guaranty of free speech and expression protects communication by sexually oriented motion pictures from total suppression, but the State may legitimately use the contents of these films as a basis for placing them in a different classification from other motion pictures.¹ In doing so, however, the State must stay within constitutional constraints and will fail for overbroad restrictions.² Content-neutral restrictions must be established pursuant to a significant government interest, reasonable in time, place, and manner, and not substantially broader than necessary to achieve the government's interests but need not involve the least restrictive means.³ Restrictions that are not content neutral are presumptively invalid and must survive strict scrutiny for a compelling state interest.⁴ A restriction based solely on nudity, and not directed toward sexually explicit nudity or otherwise limited irrespective of context or persuasiveness, is unconstitutionally overbroad.⁵

In contrast, obscenity, according to the standard enunciated by the United States Supreme Court,⁶ is not constitutionally protected free speech, and an obscene motion picture is therefore not entitled to First Amendment protection.⁷ An obscene motion picture does not acquire constitutional immunity simply because it is exhibited for consenting adults only.⁸

The application of a pandering statute to a sexually explicit but nonobscene film is precluded by the First Amendment.⁹

Depictions of violence.

A motion picture depicting scenes of violence, such as a killing spree, but falling short of the constitutionally permissible definition of obscenity, is entitled to protection under the First Amendment.¹⁰ Motion pictures depicting graphic violence are, however, subject to reasonable restrictions.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Statutes prohibiting unauthorized video recording of another person without consent in a restroom or in that other person's residence were not overbroad under First Amendment; statutes were content neutral, protection of a person's expectation of privacy in a restroom or in own home were important governmental interests, and prohibition of nonconsensual video recording in those areas was substantially related to those governmental interests. *U.S. Const. Amend. 1*; 720 Ill. Comp. Stat. Ann. 5/26-4(a-5), 26-4(a). *People v. Maillet*, 2019 IL App (2d) 161114, 437 Ill. Dec. 727, 145 N.E.3d 25 (App. Ct. 2d Dist. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976); *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 2001 FED App. 0415P (6th Cir. 2001).
A.L.R. Library
Modern concept of obscenity, 5 A.L.R.3d 1158.
- 2 U.S.—*Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 2001 FED App. 0415P (6th Cir. 2001).
Tex.—*Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014).
Wis.—*State v. Stevenson*, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90 (2000).
- 3 U.S.—*Mitchell v. Commission on Adult Entertainment Establishments of State of Del.*, 10 F.3d 123 (3d Cir. 1993); *Wall Distributors, Inc. v. City of Newport News, Va.*, 782 F.2d 1165 (4th Cir. 1986); *Matney v. County of Kenosha*, 86 F.3d 692 (7th Cir. 1996) (referencing *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).
- 4 U.S.—*Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).
Tex.—*Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014).
- 5 U.S.—*Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).
- 6 § 955.
- 7 U.S.—*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973); *U.S. v. Various Articles of Obscene Merchandise*, Schedule No. 2098, 536 F. Supp. 50 (S.D. N.Y. 1981).

Neb.—*State v. Tara Enterprises, Inc.*, 205 Neb. 516, 288 N.W.2d 290 (1980).

Ohio—*State v. Midwest Pride IV, Inc.*, 131 Ohio App. 3d 1, 721 N.E.2d 458 (12th Dist. Fayette County 1998).

A.L.R. Library

Validity, construction, and application of statutes or ordinances regulating sexual performance by child, 21 A.L.R.4th 239 (superseded by Validity and construction of 18 U.S.C.A. secs. 371 and 2252(a) penalizing mailing or receiving, or conspiring to mail or receive, child pornography, 86 A.L.R. Fed. 359, and Validity, construction, and application of 18 U.S.C.A. sec. 2251, penalizing sexual exploitation of children, 99 A.L.R. Fed. 643, and Validity, construction, and application of state statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291).

Exhibition of obscene motion pictures as nuisance, 50 A.L.R.3d 969.

8 U.S.—*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

Ind.—*State v. Virtue*, 658 N.E.2d 605 (Ind. Ct. App. 1995).

9 Cal.—*People v. Freeman*, 46 Cal. 3d 419, 250 Cal. Rptr. 598, 758 P.2d 1128 (1988).

10 La.—*Byers v. Edmondson*, 826 So. 2d 551 (La. Ct. App. 1st Cir. 2002), writ denied, 826 So. 2d 1131 (La. 2002).

11 Ill.—*Schloss v. Jumper*, 381 Ill. Dec. 694, 11 N.E.3d 57 (App. Ct. 4th Dist. 2014), appeal denied, 386 Ill. Dec. 485, 20 N.E.3d 1263 (Ill. 2014).

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

6. Films, Motion Pictures, or Videos

a. General Considerations

§ 1025. Films or videos depicting unlawful acts

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1892

Acts which are unlawful in a different context, circumstance, or place may be depicted in or incorporated into a motion picture or video presentation and come within the protection of the First Amendment guaranty of free speech and expression.

Acts which are unlawful in a different context, circumstance, or place may be depicted in or incorporated into a motion picture or video presentation and come within the protection of the First Amendment guaranty of free speech and expression, including, for example, depictions of animal cruelty.¹ However, the prohibition of an act by a penal statute does not constitute a suppression of speech or expression, even if the act is to be done for the purpose of making a movie,² as in the case of video recordings of bestiality.³

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Footnotes

- 1 U.S.—U.S. v. Stevens, 533 F.3d 218 (3d Cir. 2008), *aff'd*, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).
- 2 U.S.—U.S. v. Roeder, 526 F.2d 736 (10th Cir. 1975).
- 3 Minn.—State v. Bonyng, 450 N.W.2d 331 (Minn. Ct. App. 1990).

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16B C.J.S. Constitutional Law § 1026

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

6. Films, Motion Pictures, or Videos

a. General Considerations

§ 1026. Licensing motion picture theater or place of exhibition

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1892, 2225 to 2228

The licensing of movie theaters or other places for the exhibition of motion pictures, films, or videos is valid within the First Amendment guaranty of free speech provided the law meets the applicable level of constitutional scrutiny; sets forth definitive, objective guidelines for licensing; and does not leave licensing to the unlimited discretion of a public official.

The licensing of theatres or other places for the exhibition of motion pictures, films, or videos is valid within the First Amendment guaranty of free speech if the law is content-neutral and imposes reasonable time, manner, and place restrictions narrowly tailored to serving the government's legitimate interests.¹ In the absence of content-neutrality, as when the restrictions are content-based, a higher constitutional standard of strict scrutiny must be met, requiring compelling government interests.²

Licensing requires procedural protections to guard against impermissible censorship.³ Licensing requirements must set forth definitive, objective guidelines for licensing⁴ and must not leave licensing to the unlimited discretion of a public official.⁵

A licensing ordinance is invalid if it presents a danger of unduly suppressing protected expression.⁶

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Footnotes

- 1 U.S.—*National Amusements, Inc. v. Town of Dedham*, 846 F. Supp. 1023 (D. Mass. 1994), *aff'd*, 43 F.3d 731 (1st Cir. 1995); *Associated Film Distribution Corp. v. Thornburgh*, 614 F. Supp. 1100 (E.D. Pa. 1985), judgment *aff'd*, 800 F.2d 369 (3d Cir. 1986).
Traffic, conduct, and noise control
U.S.—*Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981).
Adult arcade permit requirement
Tex.—*8100 North Freeway Ltd. v. City of Houston*, 329 S.W.3d 858 (Tex. App. Houston 14th Dist. 2010).
Use permits for mini-theaters
Ill.—*Zebulon Enterprises, Inc. v. DuPage County*, 146 Ill. App. 3d 515, 100 Ill. Dec. 191, 496 N.E.2d 1256 (2d Dist. 1986).
A.L.R. Library
Validity of Statutes and Ordinances Regulating the Operation of Sexually Oriented Businesses—Nature of Regulation, 23 A.L.R.6th 573.
Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Types of Businesses Regulated, 21 A.L.R.6th 425.
Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130 (superseded by *Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Legal Issues and Principles*, 20 A.L.R.6th 161, and *Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Types of Businesses Regulated*, 21 A.L.R.6th 425, and *Validity of Statutes and Ordinances Regulating the Operation of Sexually Oriented Businesses—Nature of Regulation*, 23 A.L.R.6th 573).
- 2 §§ 1023, 1024.
- 3 U.S.—*Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981); *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), as modified on other grounds (Mar. 26, 2009); *Keepers, Inc. v. City of Milford, Conn.*, 944 F. Supp. 2d 129 (D. Conn. 2013).
- 4 U.S.—*John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), as modified on other grounds (Mar. 26, 2009); *Keepers, Inc. v. City of Milford, Conn.*, 944 F. Supp. 2d 129 (D. Conn. 2013).
Narrow, objective, definite standards required
U.S.—*Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233 (D. Wyo. 1997).
- 5 U.S.—*Grandco Corp. v. Rochford*, 536 F.2d 197 (7th Cir. 1976); *O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990); *Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233 (D. Wyo. 1997).
No provision for judicial review
U.S.—*Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980).
- 6 U.S.—*Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983).

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16B C.J.S. Constitutional Law § 1027

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

6. Films, Motion Pictures, or Videos

a. General Considerations

§ 1027. Location and time restrictions on adult motion picture theaters

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2227

Statutes and ordinances providing for restrictions on the physical location of adult motion picture theaters and limitations on the hours of exhibition may be valid under the First Amendment guaranty of free speech and expression if reasonably founded and limited.

The use of zoning laws and other regulations to confine or disperse the location of adult or sexually oriented theaters for the exhibition of motion pictures, films, or videos is generally permissible under the First Amendment guaranty of free speech and expression,¹ treated as time, place, and manner restrictions, requiring content-neutrality, narrow tailoring to serve a significant governmental interest, and open ample alternative channels for communication of the information.² A municipal ordinance may validly prohibit adult motion picture theaters from locating within a prescribed distance of any residential zone, single or multiple-family dwelling, church, park or school, constituting a valid time, place, and manner regulation of speech in response to the serious problems created by adult theaters.³

Certain statutes or ordinances restrictive of the physical location of adult movie theaters are infringements of free speech rights under the First Amendment as for over-breadth in restricting nonobscene adult or sexually explicit films.⁴

Hours of operation.

Statutes or ordinances restricting the hours during which adult motion pictures can be shown, enacted to assure the safety and welfare of the community, are under some circumstances valid despite the fact that the exercise of First Amendment rights may incidentally be affected.⁵

Out-of-door or drive-in theaters.

Restrictions on the location of out-of-door or drive-in theaters exhibiting adult movies may constitute valid, reasonable restrictions on the exercise of First Amendment freedoms,⁶ but a total ban of all nude film exhibitions by a drive-in-theater when its screen is visible from a public street or place is overbroad, particularly when exposure to the screen is not unavoidable.⁷

CUMULATIVE SUPPLEMENT

Cases:

City demonstrated that amended zoning regulations applicable to adult establishments served an important governmental interest, as required to satisfy intermediate scrutiny with respect to First Amendment claim by owners of such establishments; city sought to reduce negative secondary effects of establishments with predominant, ongoing focus on adult-oriented expression, and city was not required to show that amended regulations were more effective than predecessor regulations, but rather that amended regulations promoted city's interest in reducing secondary effects more effectively than if they did not exist. [U.S. Const. Amend. 1. 725 Eatery Corp. v. City of New York, 408 F. Supp. 3d 424 \(S.D. N.Y. 2019\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 \(1976\).](#)
Adult video sales locations
[N.J.—Township of Cinnaminson v. Bertino, 405 N.J. Super. 521, 966 A.2d 14 \(App. Div. 2009\).](#)
Light burden to justify
[N.M.—State, City of Albuquerque v. Pangaea Cinema LLC, 2013-NMSC-044, 310 P.3d 604 \(N.M. 2013\).](#)
A.L.R. Library
[Validity of Statutes and Ordinances Regulating the Operation of Sexually Oriented Businesses—Nature of Regulation, 23 A.L.R.6th 573.](#)
[Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Types of Businesses Regulated, 21 A.L.R.6th 425.](#)
[Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Legal Issues and Principles, 20 A.L.R.6th 161.](#)
[Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses, 10 A.L.R.5th 538.](#)
- 2 [U.S.—City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 \(1986\);](#)
[Independence News, Inc. v. City of Charlotte, 568 F.3d 148 \(4th Cir. 2009\).](#)
[N.M.—State, City of Albuquerque v. Pangaea Cinema LLC, 2013-NMSC-044, 310 P.3d 604 \(N.M. 2013\).](#)

Standard of "common sense" not sufficient

N.J.—*Township of Cinnaminson v. Bertino*, 405 N.J. Super. 521, 966 A.2d 14 (App. Div. 2009).

3 U.S.—*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

Predominant purpose not suppression

U.S.—*Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331 (9th Cir. 1986).

Predominant concern is secondary effects

U.S.—*Mom N Pops, Inc. v. City of Charlotte*, 979 F. Supp. 372 (W.D. N.C. 1997), decision *aff'd*, 162 F.3d 1155 (4th Cir. 1998); *Wolfe v. Village of Brice, Ohio*, 37 F. Supp. 2d 1021 (S.D. Ohio 1999).

Urban renewal sufficient state purpose

U.S.—*Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982).

4 U.S.—*Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981).

5 N.J.—*New Chancellor Cinema, Inc. v. Town of Irvington*, 169 N.J. Super. 564, 405 A.2d 438 (Law Div. 1979).

A.L.R. Library

Validity of Statutes and Ordinances Restricting Hours of "Adult Entertainment" or Sex-Oriented Businesses, 121 A.L.R.5th 427.

6 U.S.—*80 Drive-In, Inc. v. Baxley*, 468 F.2d 611 (5th Cir. 1972).

Ill.—*People ex rel. Carey v. Starview Drive-In Theatre, Inc.*, 100 Ill. App. 3d 624, 56 Ill. Dec. 121, 427 N.E.2d 201 (1st Dist. 1981).

N.C.—*Variety Theatres, Inc. v. Cleveland County*, 15 N.C. App. 512, 190 S.E.2d 227 (1972), decision *aff'd*, 282 N.C. 272, 192 S.E.2d 290 (1972).

7 U.S.—*Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).

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16B C.J.S. Constitutional Law § 1028

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

6. Films, Motion Pictures, or Videos

b. Prior Restraint

§ 1028. Protection from prior restraint; procedural safeguards

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1892

A system of regulation that permits the suppression of films in advance of actual expression may be deemed a prior restraint in violation of the First Amendment guaranty of free speech, and procedural safeguards against prior restraint apply.

Motion pictures, like other types of speech, are entitled to protection from prior restraint under the First Amendment guaranty of free speech,¹ as by the suppression of films in advance of actual communication or expression,² or production,³ or a blanket ban on the future publication, sale, distribution, or exhibition of films not yet determined to be obscene.⁴ Any system of prior restraint of motion pictures bears a heavy presumption against its constitutional validity.⁵

Statutes or ordinances providing for notice and an adversary hearing prior to a restraint on the exhibition of allegedly obscene films are valid and do not infringe on First Amendment rights,⁶ provided the procedures are narrowly drawn,⁷ including prompt hearing and notice.⁸ Any restraint imposed on a motion picture in advance of a final judicial determination on the merits with

respect to obscenity must be limited to a preservation of the status quo for the shortest fixed period of time compatible with sound judicial resolution, and an ordinance providing for such a prior restraint must project a prompt final judicial decision to minimize the deterrent effect of an interim and possibly erroneous classification.⁹

The prior restraint of only one copy of a film alleged to be obscene may be permissible in order that the determination of the question of probable obscenity may be made.¹⁰

Preliminary injunction against obscene film.

The issuance of a preliminary injunction to restrain the showing of an allegedly obscene motion picture, prior to a judicial decision on the merits, is a threat to protected expression if there is no guaranty of a seasonable final hearing.¹¹

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Footnotes

- 1 U.S.—*Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980); *Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965); *Vivid Entertainment, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013).
Ohio—*State ex rel. Eckstein v. Midwest Pride IV, Inc.*, 128 Ohio App. 3d 1, 713 N.E.2d 1055 (12th Dist. Fayette County 1998), cause dismissed, 85 Ohio St. 3d 1454, 708 N.E.2d 1009 (1999).
Zoning prohibition against distribution of adult films
U.S.—*Gascoe, Ltd. v. Newtown Tp., Bucks County*, 699 F. Supp. 1092 (E.D. Pa. 1988).
- 2 U.S.—*O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990).
- 3 U.S.—*Vivid Entertainment, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013).
- 4 Pa.—*Brightbill v. Rigo, Inc.*, 274 Pa. Super. 315, 418 A.2d 424 (1980).
Injunction restraining future films
Tenn.—*News Mart, Inc. v. State ex rel. Webster*, 561 S.W.2d 752 (Tenn. 1978).
- 5 U.S.—*Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980).
Mich.—*City of Cadillac v. Cadillac News & Video, Inc.*, 221 Mich. App. 645, 562 N.W.2d 267 (1997).
- 6 U.S.—*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).
Prior restraints require procedural safeguards
U.S.—*Vivid Entertainment, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013).
- 7 U.S.—*Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980).
- 8 U.S.—*Vivid Entertainment, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013).
- 9 U.S.—*Vivid Entertainment, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013).
- 10 Mo.—*State v. A Quantity of Magazines, Movies and Other Items*, 594 S.W.2d 331 (Mo. Ct. App. W.D. 1980).
- 11 U.S.—*Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (5th Cir. 1978), judgment aff'd, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980).
Invalid without procedural safeguards
Mich.—*City of Cadillac v. Cadillac News & Video, Inc.*, 221 Mich. App. 645, 562 N.W.2d 267 (1997).

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16B C.J.S. Constitutional Law § 1029

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

6. Films, Motion Pictures, or Videos

b. Prior Restraint

§ 1029. Requirement of prior submission to censor

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1892, 2225, 2226

A requirement for prior submission of motion picture films to a censor in advance of their exhibition is not unconstitutional under the First Amendment guaranty of free speech if a process takes place under procedural safeguards designed to obviate the dangers of a censorship system.

The requirement of the prior submission of motion picture films to a censor in advance of their exhibition is not unconstitutional as a prior restraint within the First Amendment guaranty of free speech¹ provided it takes place under procedural safeguards designed to obviate the dangers of a censorship system.² The burden of proving that a film is unprotected expression must rest on the censor.³

While the State may require the advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which will lend an effect of finality to the censor's determination as to

whether a film constitutes protected expression.⁴ The exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period of time, either issue a license or go to court to restrain the showing of the film.⁵

Any restraint imposed in advance of a final judicial determination on the merits must be limited to the preservation of the status quo for the shortest fixed period of time compatible with a sound judicial resolution of the censorship issue.⁶ The procedure must also assure a prompt final judicial decision to minimize the deterrent effect of an interim and possibly erroneous denial of a license.⁷

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Footnotes

- 1 U.S.—*Times Film Corp. v. City of Chicago*, 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (1961); *Studio III, Inc. v. Smith*, 326 F. Supp. 1166 (S.D. Iowa 1971).
- 2 U.S.—*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 88 S. Ct. 754, 19 L. Ed. 2d 966 (1968); *Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965).
- 3 U.S.—*Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965); *Studio III, Inc. v. Smith*, 326 F. Supp. 1166 (S.D. Iowa 1971).
- 4 Ill.—*City of Springfield v. Hall*, 93 Ill. App. 3d 860, 49 Ill. Dec. 232, 417 N.E.2d 1059 (4th Dist. 1981).
- 5 U.S.—*Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965).
- 6 U.S.—*Teitel Film Corp. v. Cusack*, 390 U.S. 139, 88 S. Ct. 754, 19 L. Ed. 2d 966 (1968); *Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965).
- 7 Ill.—*City of Springfield v. Hall*, 93 Ill. App. 3d 860, 49 Ill. Dec. 232, 417 N.E.2d 1059 (4th Dist. 1981).
- 8 U.S.—*Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965).
- 9 U.S.—*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 88 S. Ct. 754, 19 L. Ed. 2d 966 (1968); *Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965).

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16B C.J.S. Constitutional Law § 1030

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

6. Films, Motion Pictures, or Videos

b. Prior Restraint

§ 1030. Seizure of film or video prior to judicial determination

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1892, 2228

The seizure of a single copy of a film arguably protected by the First Amendment guaranty of free speech, prior to a judicial determination of obscenity, must be made pursuant to a valid search warrant, issued by a magistrate presented with an opportunity to focus searchingly on the question of obscenity, but even probable cause does not permit taking the film out of circulation completely before a judicial obscenity determination.

The seizure of a film arguably protected by the First Amendment guaranty of free speech, prior to a judicial determination of obscenity, must be made pursuant to a valid search warrant, issued by a magistrate who has been presented with an opportunity to focus searchingly on the question of obscenity.¹ However, beyond the seizure of a single copy for evidentiary purposes based on probable cause, a film may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing; a pretrial seizure of films based on a finding of probable cause, but before a judicial determination of obscenity, violates the First Amendment.²

The unsupported allegations of police officials will not sustain either the issuance of a warrant for the seizure of allegedly obscene films³ nor the warrantless seizure of an allegedly obscene film, pursuant to an arrest.⁴

There is no absolute First Amendment right to a prior adversary hearing when a single copy of an allegedly obscene film is seized, pursuant to warrant, to preserve the material as evidence in a criminal prosecution.⁵ On a showing to the trial court that other copies of the film are not available to the exhibitor, and so that First Amendment rights are not adversely affected, the court must permit the seized film to be copied so that its showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding; if copying is denied, a return of the seized material is required.⁶ There is no prior restraint on an exhibitor's First Amendment right of expression in denying return of a film if there is a failure to make a proper showing that other copies are not available.⁷

Repeated seizures of an allegedly obscene film, following a single seizure, gives rise to the likelihood that First Amendment rights are violated and, thus, a preliminary injunction may be issued against such seizures.⁸

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Footnotes

- 1 U.S.—*Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973); *Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973).
Haw.—*State v. Araki*, 82 Haw. 474, 923 P.2d 891 (1996).
Mich.—*City of Cadillac v. Cadillac News & Video, Inc.*, 221 Mich. App. 645, 562 N.W.2d 267 (1997).
Particularity required for warrants
Tex.—*State v. Brady*, 763 S.W.2d 38 (Tex. App. Corpus Christi 1988).
- 2 U.S.—*Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989).
- 3 U.S.—*Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 88 S. Ct. 2103, 20 L. Ed. 2d 1313 (1968).
Minn.—*State v. Bonyne*, 450 N.W.2d 331 (Minn. Ct. App. 1990).
- 4 U.S.—*Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).
Ga.—*Hall v. State*, 139 Ga. App. 488, 229 S.E.2d 12 (1976).
N.Y.—*Circle Cinema, Inc. v. Town of Colonie*, 82 Misc. 2d 527, 371 N.Y.S.2d 344 (Sup 1975).
- 5 U.S.—*Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973).
Mich.—*City of Cadillac v. Cadillac News & Video, Inc.*, 221 Mich. App. 645, 562 N.W.2d 267 (1997).
- 6 U.S.—*Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973).
- 7 Ill.—*People v. Hobbs*, 59 Ill. App. 3d 793, 17 Ill. Dec. 83, 375 N.E.2d 1367 (2d Dist. 1978).
- 8 U.S.—*Llewelyn v. Oakland County Prosecutor's Office*, 402 F. Supp. 1379 (E.D. Mich. 1975).
Prior final adjudication necessary
U.S.—*Bradford v. Wade*, 386 F. Supp. 1156 (N.D. Tex. 1974), *aff'd*, 530 F.2d 973 (5th Cir. 1976).

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16B C.J.S. Constitutional Law § 1031

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

7. Radio and Television

a. General Considerations

§ 1031. Radio and television as protected speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1885, 2127, 2131, 2132, 2136, 2137, 2140

Freedom of expression by way of radio and television is a freedom protected by the First Amendment guaranty of free speech and is entitled to a presumption against prior restraint, but the First Amendment does not provide an unabridgable right to broadcast comparable to the right of every individual to speak, write, or publish.

Freedom of expression by way of radio and television is a freedom protected by the First Amendment guaranty of free speech,¹ and any prior restraint is presumptively impermissible under the First Amendment though not absolutely barred in the most exceptional circumstances.² Nonetheless, of all forms of communication, broadcasting has the most limited First Amendment protection.³ The First Amendment does not provide an unabridgable right to broadcast comparable to the right of every individual to speak, write, or publish,⁴ and radio and television broadcasting is subject to licensing and regulation.⁵ For First Amendment purposes, in the medium of broadcast radio and television, it is the right of viewers and listeners, not the right of broadcasters, which is paramount.⁶

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Footnotes

- 1 U.S.—*Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981); *Claybrooks v. American Broadcasting Companies, Inc.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012).
Cal.—*Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 79 Cal. Rptr. 2d 207 (2d Dist. 1997), review granted and opinion superseded, 69 Cal. Rptr. 2d 897, 948 P.2d 409 (Cal. 1997) and dismissed, remanded and ordered published, 79 Cal. Rptr. 2d 206, 965 P.2d 724 (Cal. 1998).
Mass.—*City of Boston v. Back Bay Cultural Ass'n, Inc.*, 418 Mass. 175, 635 N.E.2d 1175 (1994).
- 2 Fla.—*Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608 (Fla. 5th DCA 2007).
N.Y.—*Porco v. Lifetime Entertainment Services, LLC*, 116 A.D.3d 1264, 984 N.Y.S.2d 457 (3d Dep't 2014).
- 3 U.S.—*F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978).
- 4 U.S.—*F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S. Ct. 2096, 56 L. Ed. 2d 697 (1978); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969); *Sinclair Broadcast Group, Inc. v. F.C.C.*, 284 F.3d 148 (D.C. Cir. 2002); *Action for Children's Television v. F.C.C.*, 58 F.3d 654 (D.C. Cir. 1995).
As to public or noncommercial services, see § 1037.
As to cable services, see § 1039.
A.L.R. Library
Access of public to broadcast facilities under First Amendment, 66 A.L.R. Fed. 628.
- 5 § 1034.
- 6 U.S.—*Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969); *Action for Children's Television v. F.C.C.*, 58 F.3d 654 (D.C. Cir. 1995).

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16B C.J.S. Constitutional Law § 1032

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

7. Radio and Television

a. General Considerations

§ 1032. Radio and television as protected speech—Indecent, profane, or obscene content

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2132, 2137

First Amendment protections for speech and press do not encompass obscenity, and federal statutory and regulatory restrictions do apply to radio or television broadcasts of obscene, indecent, or profane content.

First Amendment protections for speech and press do not encompass obscenity under the obscenity standard enunciated by the United States Supreme Court.¹ The First Amendment does not protect broadcasters from sanctions for broadcasting obscene, indecent, or profane content,² which includes references to sexual or excretory activity or organs.³ The prohibition is provided by federal statute,⁴ as to which Congress instructed the Federal Communications Commission (FCC) to enforce the indecency ban between the hours of 6:00 a.m. and 10:00 p.m.⁵

The FCC, by a conforming regulation, thus validly enforces the statute as to radio and television broadcasts between those hours.⁶ The provision directing the FCC to issue regulations banning the radio and television broadcast of indecent material

in designated hours, and regulations issued under the provision, are sufficiently narrowly tailored to serve the government's compelling interest in the well-being of children under the age of 18 for First Amendment purposes.⁷

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Footnotes

- 1 § 955.
- 2 U.S.—*F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978).
 History of regulation and enforcement
 U.S.—*CBS Corp. v. F.C.C.*, 663 F.3d 122 (3d Cir. 2011).
 "Filthy Words" monologue
 The indecency rule was first invoked against a broadcast of George Carlin's "Filthy Words" monologue.
 U.S.—*F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009).
 A.L.R. Library
 Musical sound recording as punishable obscenity, 30 A.L.R.5th 718.
 Modern concept of obscenity, 5 A.L.R.3d 1158.
- 3 U.S.—*F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009).
- 4 18 U.S.C.A. § 1464; 47 U.S.C.A. § 303 note.
 Scienter required
 U.S.—*U.S. v. Smith*, 467 F.2d 1126 (7th Cir. 1972).
 FCC's definition of "indecent" not vague or overbroad
 U.S.—*U.S. v. Evergreen Media Corp. of Chicago, AM*, 832 F. Supp. 1183 (N.D. Ill. 1993).
- 5 U.S.—*F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009).
- 6 U.S.—*Action for Children's Television v. F.C.C.*, 58 F.3d 654 (D.C. Cir. 1995).
 Conforming FCC regulatory decision and regulation
 47 C.F.R. § 73.3999 provides that (a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene; and (b) no licensee of a radio or television broadcast station shall broadcast on any day between 6:00 a.m. and 10:00 p.m. any material which is indecent.
 U.S.—*In the Matter of Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. s 1464, 10 F.C.C.R. 10558, 1995 WL 490828 (F.C.C. 1995).
- 7 U.S.—*Action for Children's Television v. F.C.C.*, 58 F.3d 654 (D.C. Cir. 1995).

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16B C.J.S. Constitutional Law § 1033

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

7. Radio and Television

a. General Considerations

§ 1033. Radio and television as protected speech—Effect on liability

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1885, 2131, 2132, 2136, 2137, 2140

The First Amendment guaranty of free speech and expression does not immunize conduct which is otherwise unlawful merely because it is broadcast, and an absence of significant nonspeech elements requires scrutiny for First Amendment purposes; the First Amendment precludes liability for broadcast of truthful information on matters of public concern, but a broadcaster may be liable for a foreseeable undue risk of harm, or for an unauthorized use of a person's name, portrait, or picture for advertising purposes or for purposes of trade.

Conduct which is otherwise unlawful is not immunized from liability by the First Amendment guaranty of free speech and expression because it involves a broadcast.¹ A mixture of conduct and speech does not remove the constitutional scrutiny required for the imposition of liability on a broadcaster when the challenged acts do not have significant nonspeech elements.² The application of the civil damages provisions of state and federal Wiretapping Acts to a broadcaster's disclosure and broadcast of a cellular telephone conversation intercepted by a third party violated the First Amendment under the intermediate standard of scrutiny applicable to content-neutral restrictions on pure speech, absent evidence that the broadcaster or the source participated in or encouraged the illegal interception.³

The First Amendment does not bar a broadcaster's liability for a broadcast involving a contest that foreseeably results in an undue risk of injury or death.⁴ The First Amendment, however, requires a showing of incitement in an action to recover from television broadcasters for alleged negligence and recklessness on the basis of a viewer's engaging in harmful action because of a single broadcast⁵ or because of television broadcasting in general.⁶

The First Amendment precludes a broadcaster's liability on grounds of privacy invasion or defamation when the information reported is accurate, not illegally obtained, and concerns a matter of public significance.⁷ For example, the First Amendment shields television producers from civil liability under a state privacy act for televising a reality crime show depicting an arrestee's arrest where the show conveys truthful information on matters of public concern and uses the arrestee's identity for noncommercial purposes.⁸ Likewise, a videotape depicting a victim's alleged rape by her husband may be considered substantially relevant to a matter of legitimate public interest where the videotape concerns the prosecution of the victim's husband and the focus of the news broadcast is on the perpetrator, not the victim.⁹

The First Amendment does not immunize television broadcasters when they videotape and broadcast a performer's entire act without consent¹⁰ and does not create a right to broadcast a performance without a license or consent from the parties holding valid ownership rights.¹¹

News gathering activities of videotaping and reporting on an illegal dogfight are not protected by the First Amendment in relation to a statute that does not prohibit a news reporter from gathering or disseminating information about dogfighting but rather prohibits attendance, by anyone, at any dogfight presented for profit or entertainment.¹²

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Footnotes

- 1 U.S.—*Risenhoover v. England*, 936 F. Supp. 392 (W.D. Tex. 1996).
A.L.R. Library
Liability for personal injury or death allegedly resulting from television or radio broadcast, 20 A.L.R.4th 327. First Amendment as immunizing newsman from liability for tortious conduct while gathering news, 28 A.L.R. Fed. 904.
- 2 U.S.—*Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), judgment aff'd, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001); *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000).
- 3 U.S.—*Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), judgment aff'd, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001).
Wiretap liability statute upheld
U.S.—*Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000).
- 4 Cal.—*Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975).
- 5 Cal.—*Olivia N. v. National Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1st Dist. 1981).
Hanging stunt
R.I.—*DeFilippo v. National Broadcasting Co., Inc.*, 446 A.2d 1036 (R.I. 1982).
- 6 U.S.—*Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979).
- 7 La.—*Johnston v. NOE Corp. L.L.C.*, 81 So. 3d 735, 277 Ed. Law Rep. 1245 (La. Ct. App. 2d Cir. 2011), writ denied, 84 So. 3d 532 (La. 2012).
Tex.—*Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124 (Tex. App. San Antonio 2001).
Public figure's personal records lawfully acquired
Fla.—*Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608 (Fla. 5th DCA 2007).
Facts broadcast from official court records
Cal.—*Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679, 21 Cal. Rptr. 3d 663, 101 P.3d 552 (2004).
- 8 U.S.—*Best v. Berard*, 776 F. Supp. 2d 752 (N.D. Ill. 2011).

- 9 U.S.—[Anderson v. Suiter](#), 499 F.3d 1228 (10th Cir. 2007).
- 10 U.S.—[Zacchini v. Scripps-Howard Broadcasting Co.](#), 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977).
- 11 U.S.—[In re NCAA Student-Athlete Name & Likeness Licensing Litigation](#), 37 F. Supp. 3d 1126 (N.D. Cal. 2014).

Violation of publicity rights

In a claim alleging violations of publicity rights of professional football players, the First Amendment interests and protections of television productions recounting the professional football games outweigh the rights of the players who appeared in the productions since the productions are not commercial speech and are fully protected speech; although the National Football League (NFL) has an economic interest in creating the productions, the league does not pay television networks to broadcast the productions, the productions use the players' footage merely because the games cannot be described visually any other way, and the productions do not reference a separate product or service.

- U.S.—[Dryer v. National Football League](#), 2014 WL 5106738 (D. Minn. 2014).
- 12 Colo.—[People v. Bergen](#), 883 P.2d 532 (Colo. App. 1994).

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16B C.J.S. Constitutional Law § 1034

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

7. Radio and Television

a. General Considerations

§ 1034. Licensing and regulation

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2128, 2131, 2133, 2136

The First Amendment guaranty of free speech and press does not preclude the regulation of broadcast radio or television by licensing and standards of public interest, convenience, or necessity.

The First Amendment guaranty of the right of free speech and press does not include an unabridged right to hold a broadcast license,¹ a right to monopolize a frequency to the exclusion of fellow citizens,² or a right to use the facilities of radio or television without a license.³ Given the scarcity of electromagnetic frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed⁴ and to require a sharing of frequencies.⁵ Under regulatory and licensing legislation, the First Amendment does not preclude the refusal of the Federal Communications Commission (FCC) to grant a license on the ground of public interest, convenience, or necessity,⁶ or refusal to renew a license for cause.⁷ Federal regulation of the broadcast spectrum, a scarce public resource, is entitled to more deferential First Amendment review than regulation of other types of media.⁸ The balancing of First Amendment interests which takes place when the FCC makes a determination of the issue of a right to broadcast is a process which must necessarily be undertaken within the applicable statutory framework.⁹

CUMULATIVE SUPPLEMENT

Cases:

Former licensee's claim alleging taking without just compensation, stemming from Federal Communications Commission's (FCC) cancellation of two wireless personal communications service (PCS) spectrum licenses that licensee purchased in auction and licensee's subsequent default on its installment payments under promissory notes and security agreements, was claim that fell squarely within judicial-review provision of Communications Act. [U.S. Const. Amend. 5](#); Communications Act of 1934 § 402, [47 U.S.C.A. § 402\(b\)\(5\)](#). [Alpine PCS, Inc. v. United States](#), 878 F.3d 1086 (Fed. Cir. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—F.C.C. v. National Citizens Committee for Broadcasting](#), 436 U.S. 775, 98 S. Ct. 2096, 56 L. Ed. 2d 697 (1978); [Sinclair Broadcast Group, Inc. v. F.C.C.](#), 284 F.3d 148 (D.C. Cir. 2002).
FCC enforcement
[U.S.—CBS, Inc. v. F.C.C.](#), 453 U.S. 367, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981); [U.S. v. Szoka](#), 260 F.3d 516, 2001 FED App. 0245P (6th Cir. 2001).
FCC regulation
[U.S.—F.C.C. v. WNCN Listeners Guild](#), 450 U.S. 582, 101 S. Ct. 1266, 67 L. Ed. 2d 521 (1981).
- 2 [U.S.—Red Lion Broadcasting Co. v. F.C.C.](#), 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969).
- 3 [U.S.—Red Lion Broadcasting Co. v. F.C.C.](#), 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969); [National Broadcasting Co. v. U.S.](#), 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344 (1943).
Prohibiting coercion of licensee
[U.S.—U.S. v. Petrillo](#), 332 U.S. 1, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947).
A.L.R. Library
[Access of public to broadcast facilities under First Amendment](#), 66 A.L.R. Fed. 628.
- 4 [U.S.—Astroline Communications Co. Ltd. Partnership v. Shurberg Broadcasting of Hartford, Inc.](#), 498 U.S. 892, 111 S. Ct. 238, 112 L. Ed. 2d 198 (1990).
Allocation and regulation of broadcast frequencies
[U.S.—F.C.C. v. National Citizens Committee for Broadcasting](#), 436 U.S. 775, 98 S. Ct. 2096, 56 L. Ed. 2d 697 (1978).
Radio spectrum allocation
[U.S.—Free Speech ex rel. Ruggiero v. Reno](#), 200 F.3d 63 (2d Cir. 1999).
Empty bands do not permit broadcasts
[U.S.—U.S. v. Weiner](#), 701 F. Supp. 14 (D. Mass. 1988), judgment aff'd, 887 F.2d 259 (1st Cir. 1989).
- 5 [U.S.—Red Lion Broadcasting Co. v. F.C.C.](#), 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969).
- 6 [U.S.—F.C.C. v. Pacifica Foundation](#), 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978); [Sinclair Broadcast Group, Inc. v. F.C.C.](#), 284 F.3d 148 (D.C. Cir. 2002).
Barred licensing of newspaper-broadcast combinations
[U.S.—F.C.C. v. National Citizens Committee for Broadcasting](#), 436 U.S. 775, 98 S. Ct. 2096, 56 L. Ed. 2d 697 (1978).
Willingness of stations to present controversial views
[U.S.—Red Lion Broadcasting Co. v. F.C.C.](#), 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969).
Quantitative program standards not required
[U.S.—National Black Media Coalition v. F.C.C.](#), 589 F.2d 578 (D.C. Cir. 1978).
- 7 [U.S.—CBS, Inc. v. F.C.C.](#), 453 U.S. 367, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981).

- 8 U.S.—*Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192 (9th Cir. 2013), cert. denied, 134 S. Ct. 2874, 189 L. Ed. 2d 834 (2014).
- 9 U.S.—*Barnstone v. University of Houston, KUHT-TV*, 460 U.S. 1023, 103 S. Ct. 1274, 75 L. Ed. 2d 495 (1983); *Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192 (9th Cir. 2013), cert. denied, 134 S. Ct. 2874, 189 L. Ed. 2d 834 (2014).

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16B C.J.S. Constitutional Law § 1035

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

7. Radio and Television

a. General Considerations

§ 1035. Licensing and regulation—Program content

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1885, 2132, 2137

The First Amendment guaranty of free speech and press does not prohibit government regulation of the content of radio and television programs provided the regulations are narrowly tailored to further a substantial governmental interest.

The First Amendment right of the public to receive suitable access to social, esthetic, political, moral, and other ideas and experiences may not be constitutionally abridged by either Congress or the Federal Communications Commission (FCC).¹ Regulations are valid if they further an important or substantial governmental interest and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.²

The First Amendment does not bar all limitations on the power of an individual licensee to determine what it will transmit to the listening and viewing public,³ as the substance and procedure of programming decisions is a matter of public concern,⁴ but the First Amendment requires that radio and television broadcasters be permitted to exercise discretion in programming, and to exercise the widest possible freedom, consistent with their public responsibilities.⁵

Regulations must not punish a substantial amount of free speech, and impermissibly vague or overbroad regulations or restrictions violate the First Amendment.⁶ A content-based broadcast regulation's restrictions on advertising may be upheld under the First Amendment only if narrowly tailored to further a substantial governmental interest, under an intermediate level of scrutiny.⁷

Regulating the casting process of a television program necessarily regulates the end product; in this respect, casting and the resulting work of entertainment are inseparable and must both be protected to ensure that the producers' freedom of speech is not abridged.⁸

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Footnotes

- 1 U.S.—*Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969); *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979).
- 2 U.S.—*National Association of Broadcasters v. Kleindienst*, 405 U.S. 1000, 92 S. Ct. 1290, 31 L. Ed. 2d 472 (1972).
- 3 U.S.—*Writers Guild of America, West, Inc. v. American Broadcasting Co., Inc.*, 609 F.2d 355 (9th Cir. 1979); *Yale Broadcasting Co. v. F.C.C.*, 478 F.2d 594 (D.C. Cir. 1973).
- 4 U.S.—*Mills v. Steger*, 64 Fed. Appx. 864, 177 Ed. Law Rep. 149 (4th Cir. 2003).
- 5 § 1036.
- 6 U.S.—*Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014).
- 7 U.S.—*Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192 (9th Cir. 2013), cert. denied, 134 S. Ct. 2874, 189 L. Ed. 2d 834 (2014).
- 8 U.S.—*Claybrooks v. American Broadcasting Companies, Inc.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012).

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16B C.J.S. Constitutional Law § 1036

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

7. Radio and Television

a. General Considerations

§ 1036. News and journalism

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1885, 2132, 2137

Radio and television newscasters are entitled under the First Amendment guaranty of free speech and press to exercise the widest journalistic freedom consistent with their public duties.

The First Amendment guaranty of free speech and press requires that radio and television broadcasters be permitted to exercise discretion in programming,¹ and radio and television newscasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties.² Editorial decisions in news reports are protected, including the decision to exclude, as well as to include, information.³

The First Amendment guarantees television news reporters no greater constitutional right of special access to information than that possessed by the general public, and television news must abide by laws of general applicability even though the laws may impose an incidental burden upon the ability to gather or report the news.⁴ Allowing the press to report or disseminate

information gathered lawfully and from proceedings in open court or public records does not constitute a right to televise or broadcast a trial, but permission may be granted.⁵

A law violation in news gathering must be remedied through legal means other than the suppression of protected speech.⁶

Equal opportunities for candidates.

Under the First Amendment, a broadcaster cannot grant or deny access to a debate among candidates for political office on the basis of whether it agrees with a candidate's views since viewpoint discrimination in that context would present not a calculated risk but an inevitability of skewing the electoral dialogue.⁷ Under the Federal Communications Act, if any licensee permits a candidate to use a broadcast station, the licensee must afford equal opportunities to other candidates for the same office in the use of the station.⁸

Journalist's privilege.

The First Amendment does not grant a journalist any privilege, qualified or absolute, to refuse to reveal confidential information which is admittedly relevant to a court proceeding.⁹

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Footnotes

- 1 U.S.—[Arkansas Educ. Television Com'n v. Forbes](#), 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); [Barnstone v. University of Houston, KUHT-TV](#), 460 U.S. 1023, 103 S. Ct. 1274, 75 L. Ed. 2d 495 (1983); [Masterson v. Meade County Fiscal Court](#), 489 F. Supp. 2d 740 (W.D. Ky. 2007).
No obligation to accept underwriting offer
U.S.—[Knights of Ku Klux Klan v. Bennett](#), 29 F. Supp. 2d 576, 131 Ed. Law Rep. 755 (E.D. Mo. 1998), *aff'd*, 203 F.3d 1085, 141 Ed. Law Rep. 1001 (8th Cir. 2000).
- 2 U.S.—[Arkansas Educ. Television Com'n v. Forbes](#), 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); [F.C.C. v. League of Women Voters of California](#), 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278, 39 Fed. R. Serv. 2d 389 (1984); [CBS, Inc. v. F.C.C.](#), 453 U.S. 367, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981).
Editorializing by public station
U.S.—[F.C.C. v. League of Women Voters of California](#), 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278, 39 Fed. R. Serv. 2d 389 (1984).
- 3 U.S.—[Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.](#), 306 F.3d 806 (9th Cir. 2002).
- 4 U.S.—[Risenhoover v. England](#), 936 F. Supp. 392 (W.D. Tex. 1996).
Colo.—[People v. Bergen](#), 883 P.2d 532 (Colo. App. 1994).
No right to enter private home
N.Y.—[Anderson v. WROC-TV](#), 109 Misc. 2d 904, 441 N.Y.S.2d 220 (Sup 1981).
No right to enter penal facility
U.S.—[Houchins v. KQED, Inc.](#), 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978).
No right to film criminal executions
U.S.—[Entertainment Network, Inc. v. Lappin](#), 134 F. Supp. 2d 1002 (S.D. Ind. 2001).
A.L.R. Library
[Validity of Rules and Regulations Concerning Viewing of Execution of Death Penalty](#), 107 A.L.R.5th 291. § 979.
- 5
- 6 U.S.—[CBS, Inc. v. Davis](#), 510 U.S. 1315, 114 S. Ct. 912, 127 L. Ed. 2d 358 (1994).
- 7 U.S.—[Arkansas Educ. Television Com'n v. Forbes](#), 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).
A.L.R. Library

Liability of radio or television company for failure to afford equal time to political candidates, 31 A.L.R.3d 1448.

8 C.J.S., Telecommunications § 169.

9 §§ 971, 983.

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16B C.J.S. Constitutional Law § 1037

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

7. Radio and Television

b. Particular Media or Instrumentalities

§ 1037. Public or noncommercial broadcasting

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2142

As state instrumentalities, public broadcast licensees are without the protection of the First Amendment guaranty of free speech and press, but public affairs programming by noncommercial broadcasters is subject to First Amendment protections.

Public broadcast licensees have the same rights and obligations as their private counterparts but, as state instrumentalities, the licensees are without the protection of the First Amendment guaranty of free speech and press.¹ The First Amendment does not compel public broadcasters to allow third parties access to their programming.² Debates among candidates for political office present a narrow exception to the rule, since a televised debate among candidates for political office is a nonpublic forum, but a public broadcaster may exclude an independent candidate with little popular support in the reasonable, viewpoint-neutral exercise of its journalistic discretion.³

Public affairs programming by noncommercial broadcasters is subject to First Amendment protections.⁴ For purposes of a First Amendment analysis, when a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.⁵

A federal statute that prohibits advertising of for-profit goods and services on noncommercial educational (NCE) stations does not violate the First Amendment when it is narrowly tailored to further the government's substantial interest in maintaining the educational mission and nature of public broadcasting.⁶ The statute does not ban all promotional content, but uses targeted restrictions that leave untouched speech that does not undermine the statute's goals, including the airing of enhanced underwriting and nonprofit advertising, which both the Federal Communications Commission (FCC) and Congress determined do not pose the same risk to programming as advertisements, and there is no sufficient less restrictive means of achieving government's goal.⁷

Electoral coverage and debates.

The First Amendment does not bar a state from requiring a public broadcasting authority to maintain balance, fairness, and equity in its political coverage since the authority is the State's agent and its power, limitations, and restrictions are prescribed by the State.⁸ Further, a state public broadcasting authority's exclusion of an independent gubernatorial candidate from a televised debate is viewpoint-neutral and does not violate the First Amendment when the authority limits participation to qualified candidates under state law.⁹

CUMULATIVE SUPPLEMENT

Cases:

Criteria used by state agency that operated public television station to restrict who could appear in televised debate applied objective criteria, and thus criteria did not violate the First Amendment; criteria did not restrict who could access the ballot. *U.S. Const. Amend. 1. Libertarian National Committee, Inc. v. Holiday*, 907 F.3d 941 (6th Cir. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Barnstone v. University of Houston, KUHT-TV*, 460 U.S. 1023, 103 S. Ct. 1274, 75 L. Ed. 2d 495 (1983); *Muir v. Alabama Educational Television Com'n*, 688 F.2d 1033, 66 A.L.R. Fed. 585 (5th Cir. 1982).
A.L.R. Library
State regulation of content of and representation on program presented by "public broadcasting" television or radio station, 27 A.L.R.4th 375.
Construction and application of Public Broadcasting Act of 1967 as amended (47 U.S.C.A. secs. 396 et seq.) with respect to controlling content of public television programs, 44 A.L.R. Fed. 350.
- 2 U.S.—*Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); *Hogan v. Township of Haddon*, 278 Fed. Appx. 98 (3d Cir. 2008).
A.L.R. Library
Access of public to broadcast facilities under First Amendment, 66 A.L.R. Fed. 628.
- 3 U.S.—*Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

- 4 U.S.—*Muir v. Alabama Educational Television Com'n*, 688 F.2d 1033, 66 A.L.R. Fed. 585 (5th Cir. 1982);
Minority Television Project, Inc. v. F.C.C., 736 F.3d 1192 (9th Cir. 2013), cert. denied, 134 S. Ct. 2874, 189
L. Ed. 2d 834 (2014).
- Commission by government not control of content**
- 5 U.S.—*Schnapper v. Foley*, 471 F. Supp. 426 (D.D.C. 1979), judgment aff'd, 667 F.2d 102 (D.C. Cir. 1981).
- 6 U.S.—*Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).
- 7 U.S.—*Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192 (9th Cir. 2013), cert. denied, 134 S. Ct.
2874, 189 L. Ed. 2d 834 (2014).
- 8 U.S.—*Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192 (9th Cir. 2013), cert. denied, 134 S. Ct.
2874, 189 L. Ed. 2d 834 (2014).
- 9 N.J.—*McGlynn v. New Jersey Public Broadcasting Authority*, 88 N.J. 112, 439 A.2d 54, 27 A.L.R.4th 322
(1981).
- U.S.—*Arons v. Donovan*, 882 F. Supp. 379 (D.N.J. 1995).

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16B C.J.S. Constitutional Law § 1038

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

7. Radio and Television

b. Particular Media or Instrumentalities

§ 1038. Public or noncommercial broadcasting—Public access channels

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2142

A local public access television channel is a designated public forum for purposes of a First Amendment free speech analysis.

Local public access television is a designated public forum for free speech analysis purposes,¹ but neither opening nor closing a local public access television channel as a public forum is subject to a First Amendment claim.² A local franchising authority may avoid liability in its exercise of editorial control of public access channel content only to extent that it exercises its control within First Amendment boundaries.³ Control of access cannot be based on subject matter or speaker identity provided the broadcast area qualification is met.⁴

A fee for access to a local public access channel's programming, if the programs are not locally produced, is a content-neutral restriction subject to only intermediate scrutiny, requiring a showing only that the fee is narrowly tailored to protect identified government interests.⁵

CUMULATIVE SUPPLEMENT

Cases:

City did not have any formal easement or other property interest in public access cable channels, for purposes of subjecting the channels to First Amendment constraints, even though franchise agreements between city and cable operator allowed city to designate a private entity to operate the public access channels on operator's cable system and city allowed cable operator to lay cable along public rights-of-way; cable operator was private entity that owned its cable network, the private nonprofit corporation designated to operate the public access channels on the network did so with its own facilities and equipment, and franchise agreements expressly placed the public access channels under corporation's jurisdiction. [U.S. Const. Amend. 1. Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921 \(2019\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Jersawitz v. People TV, 71 F. Supp. 2d 1330 \(N.D. Ga. 1999\).](#)
- 2 U.S.—[Rhames v. City of Biddeford, 204 F. Supp. 2d 45 \(D. Me. 2002\); Philadelphia Community Access Coalition v. Street, 2002 WL 1611542 \(E.D. Pa. 2002\).](#)
- 3 U.S.—[Jersawitz v. People TV, 71 F. Supp. 2d 1330 \(N.D. Ga. 1999\).](#)
- 4 U.S.—[Coplin v. Fairfield Public Access Television Committee, 111 F.3d 1395 \(8th Cir. 1997\).](#)
- 5 U.S.—[Horton v. City of Houston, Tex., 179 F.3d 188 \(5th Cir. 1999\).](#)

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16B C.J.S. Constitutional Law § 1039

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

7. Radio and Television

b. Particular Media or Instrumentalities

§ 1039. Cable television

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2140, 2141

Cable programmers and cable operators engage in and transmit speech and thus are entitled to the protection of the speech and press clauses of the First Amendment.

Cable television programmers and cable operators engage in and transmit speech and are entitled to the protection of the speech and press clauses of the First Amendment.¹ Federal statutes regulating cable communications² are within the constraints of the First Amendment.³

State⁴ and local cable television franchising processes must operate within First Amendment constraints.⁵ A state cable franchising provision violated the First Amendment by excluding a small number of incumbent cable providers from the statewide franchising benefits made available to other providers, until their prior local franchises expired, absent a showing that the exclusion served a compelling state interest and was narrowly drawn to achieve that end.⁶

Taxation.

A state's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate the First Amendment, absent any indication that the state has targeted cable television in a purposeful attempt to interfere with its First Amendment activities, particularly when the sales tax is not content based.⁷

CUMULATIVE SUPPLEMENT

Cases:

A cable company alleging a violation of its First Amendment rights must show that the challenged government action actually regulates protected speech, or interferes with its speech rights; after all, without a plausible allegation that the offensive conduct interferes with First Amendment rights, a reviewing court has neither a reason nor the ability to subject the conduct of the governmental actor to heightened scrutiny. *U.S. Const. Amend. 1. Comcast of Maine/New Hampshire, Inc. v. Mills*, 988 F.3d 607 (1st Cir. 2021).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012); *Comcast Corp. v. F.C.C.*, 579 F.3d 1 (D.C. Cir. 2009).
First Amendment interests implicated
U.S.—*City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S. Ct. 2034, 90 L. Ed. 2d 480 (1986).
Selection of programming as speech activity
Ariz.—*Coleman v. City of Mesa*, 230 Ariz. 352, 284 P.3d 863 (2012).
47 U.S.C.A. §§ 521 et seq.
- 2
- 3 U.S.—*Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); *Time Warner Entertainment Co., L.P. v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000).
Program carriage regime upheld
U.S.—*Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137 (2d Cir. 2013).
Vertical integration restrictions upheld
U.S.—*Cablevision Systems Corp. v. F.C.C.*, 649 F.3d 695 (D.C. Cir. 2011).
Market modification of "Must Carry" statute upheld
U.S.—*Cablevision Systems Corp. v. F.C.C.*, 570 F.3d 83 (2d Cir. 2009).
- 4 U.S.—*Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012) (applying Texas law).
- 5 U.S.—*Preferred Communications, Inc. v. City of Los Angeles, Cal.*, 754 F.2d 1396 (9th Cir. 1985), judgment aff'd and remanded, 476 U.S. 488, 106 S. Ct. 2034, 90 L. Ed. 2d 480 (1986).
- 6 U.S.—*Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012) (applying Texas law).
- 7 U.S.—*Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991).

16B C.J.S. Constitutional Law § 1040

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

8. Internet

§ 1040. Regulation of speech on the Internet; general considerations

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2149 to 2154

Speech on the Internet stands on equal footing with other forms of speech as protected by the First Amendment guaranty of freedom of speech and freedom of the press.

Speech on the Internet stands on equal footing with other forms of speech as protected by the First Amendment guaranty of freedom of speech and freedom of the press.¹ Internet "speech" may include a posting to an Internet message board² or a single click of a mouse to produce a message that the user "likes" a political candidate's campaign page or social media website and is protected as such.³ However, some limitations may apply in the blogging context; while journalistic protections apply in the Internet context as to any other medium of news dissemination, a "speaker" who is a "self-appointed" journalist with little track record and without ties to traditional news media may be afforded lesser protection.⁴

CUMULATIVE SUPPLEMENT

Cases:

Candidate's campaign statements referring to herself on her political campaign internet website as a psychologist were entitled to full First Amendment protection to order from Texas State Board of Examiners of Psychologists under provision of Psychologists' Licensing Act governing the practice of psychology to stop using title of "psychologist," since she was seeking votes, not clients; professional speech doctrine was inapplicable, even assuming that it was valid, since candidate's speech was far removed from context of professional speech in that she was not providing advice to any particular client but communicating with voters at large. [U.S.C.A. Const.Amend. 1](#); [V.T.C.A., Occupations Code § 501.003\(b\)\(1\)](#). [Serafine v. Branaman](#), 810 F.3d 354 (5th Cir. 2016).

The creation and dissemination of information are "speech" within the meaning of the First Amendment. [U.S.C.A. Const.Amend. 1](#). [Digital Recognition Network, Inc. v. Hutchinson](#), 803 F.3d 952 (8th Cir. 2015).

Insofar as a broadband internet provider might offer its own content, such as a news or weather website, separate from its internet access service, the provider would receive the same First Amendment protections as other producers of internet content. [U.S. Const. Amend. 1](#). [United States Telecom Association v. Federal Communications Commission](#), 825 F.3d 674 (D.C. Cir. 2016).

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Footnotes

- 1 [U.S.—*Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 \(1997\); *Bland v. Roberts*, 730 F.3d 368 \(4th Cir. 2013\), as amended \(Sept. 23, 2013\); *Doe v. Shurtleff*, 628 F.3d 1217 \(10th Cir. 2010\); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 \(S.D. N.Y. 2014\).](#)
[Cal.—*Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231 \(6th Dist. 2008\).](#)
[Ill.—*Hadley v. Doe*, 2014 IL App \(2d\) 130489, 382 Ill. Dec. 75, 12 N.E.3d 75 \(App. Ct. 2d Dist. 2014\), appeal allowed, \(Sept. 24, 2014\).](#)
[Ky.—*Doe v. Coleman*, 436 S.W.3d 207 \(Ky. Ct. App. 2014\).](#)
[S.C.—*State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 \(2013\).](#)
[Va.—*Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 62 Va. App. 678, 752 S.E.2d 554 \(2014\).](#)
A.L.R. Library
[First Amendment Protection Afforded to Blogs and Bloggers](#), 35 A.L.R.6th 407.
[First Amendment Protection Afforded to Web Site Operators](#), 30 A.L.R.6th 299.
[Validity of State Statutes and Administrative Regulations Regulating Internet Communications Under Commerce Clause and First Amendment of Federal Constitution](#), 98 A.L.R.5th 167.
- 2 [N.J.—*Too Much Media, LLC v. Hale*, 206 N.J. 209, 20 A.3d 364 \(2011\).](#)
- 3 [U.S.—*Bland v. Roberts*, 730 F.3d 368 \(4th Cir. 2013\), as amended \(Sept. 23, 2013\).](#)
- 4 [N.J.—*Too Much Media, LLC v. Hale*, 206 N.J. 209, 20 A.3d 364 \(2011\).](#)
Website operator as "reporter" with privilege
[N.H.—*Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 160 N.H. 227, 999 A.2d 184 \(2010\).](#)

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16B C.J.S. Constitutional Law § 1041

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

8. Internet

§ 1041. Regulatory standards and applications

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2149 to 2154

Content-based restrictions on speech on the Internet are subject to heightened scrutiny for a compelling state interest under the First Amendment guaranty of freedom of speech and press while intermediate level scrutiny for a substantial interest applies to content-neutral restrictions.

Just as each medium of expression may present its own First Amendment problems, the special factors recognized as warranting government regulation of the broadcast media—the history of extensive government regulation of broadcasting and the scarcity of available frequencies at its inception, and its invasive nature—are not present in cyberspace and provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet.¹ As applied to the Internet, a content-based restriction of speech imposes an especially heavy burden on the government to explain why a less restrictive provision would not be as effective, failing which, the provision is not narrowly tailored and is fatally overbroad.² The standard for a content-based Internet restriction is one of strict scrutiny that the restriction is necessary to serve a compelling government interest.³ The standard for a content-neutral Internet restriction is one of intermediate scrutiny, requiring the restriction to serve a substantial government interest and be narrowly drawn to serve that interest without unnecessary interference with First Amendment freedoms.⁴

Academic rules are not government regulations, and thus, posts to a social networking website that violate program rules and are relevant to established professional conduct standards are unprotected speech.⁵

Specific applications of rules.

Content-based restrictions did not survive constitutional scrutiny as applied to the Communications Decency Act prohibiting the transmission of obscene or indecent communications by means of a telecommunications device to persons under age 18.⁶ Similarly, an interstate stalking statute criminalizing anyone who intentionally caused substantial emotional distress to another person using an interactive computer service failed to survive scrutiny⁷ as did a local law prohibiting cyberbullying against "any minor or person" situated in the county.⁸ In contrast to the above cases, however, a cyberstalking statute has been held as not facially overbroad where the element of threat is an integral part of the offense and the statute requires that a defendant knowingly and without lawful justification specifically harass the victim by transmitting a threat.⁹

CUMULATIVE SUPPLEMENT

Cases:

Cyberbullying statute making it unlawful for any person to use a computer or computer network to post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor with the intent to intimidate or torment a minor was content based, as opposed to content neutral, and, thus, strict scrutiny applied to determining whether statute violated First Amendment guarantee of freedom of speech; statute defined regulated speech by its particular subject matter, and, since statute criminalized some messages but not others, it was impossible to determine whether accused had committed crime without examining content of communication. [U.S. Const. Amend. 1](#); [N.C. Gen. Stat. Ann. § 14-458.1\(a\)\(1\)\(d\)](#). [State v. Bishop](#), 787 S.E.2d 814 (N.C. 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Reno v. American Civil Liberties Union](#), 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).
A.L.R. Library
[First Amendment Protection Afforded to Blogs and Bloggers](#), 35 A.L.R.6th 407.
[First Amendment Protection Afforded to Web Site Operators](#), 30 A.L.R.6th 299.
[Validity of State Statutes and Administrative Regulations Regulating Internet Communications Under Commerce Clause and First Amendment of Federal Constitution](#), 98 A.L.R.5th 167.
[Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet](#), 7 A.L.R. Fed. 2d 1.
- 2 U.S.—[Reno v. American Civil Liberties Union](#), 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).
- 3 U.S.—[Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Templeton](#), 954 F. Supp. 2d 1205 (D. Kan. 2013); [U.S. v. Cassidy](#), 814 F. Supp. 2d 574 (D. Md. 2011).
[Fla.—Simmons v. State](#), 944 So. 2d 317 (Fla. 2006).
- 4 U.S.—[Doe v. Shurtleff](#), 628 F.3d 1217 (10th Cir. 2010).
- 5 Minn.—[Tatro v. University of Minnesota](#), 816 N.W.2d 509, 281 Ed. Law Rep. 1224 (Minn. 2012).
A.L.R. Library

Validity of Adverse Personnel Action or Adverse Action Affecting Student's Academic Standing Based on Internet Posting or Expression, Including Social Networking, 49 A.L.R.6th 115.

6 U.S.—*Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

7 U.S.—*U.S. v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011).

8 N.Y.—*People v. Marquan M.*, 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079 (2014).

9 Ill.—*People v. Sucic*, 401 Ill. App. 3d 492, 340 Ill. Dec. 634, 928 N.E.2d 1231 (1st Dist. 2010).

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16B C.J.S. Constitutional Law § 1042

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

8. Internet

§ 1042. Anonymous speech and limitations

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2149 to 2154

Anonymous speech on the Internet is speech protected by the First Amendment guaranty of freedom of speech and press but is subject to qualifications.

The First Amendment's protection of Internet speech extends as well to anonymous speech disseminated through the Internet,¹ but that protection is not absolute² and does not extend to defamatory speech,³ libelous postings,⁴ other tortious communications,⁵ threats of violence against political candidates,⁶ or encroachment on the intellectual property rights of others.⁷

Criminal offender tracking statutes may validly require offenders to register their "Internet identifiers."⁸

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Footnotes

- 1 U.S.—*Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997); *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011); *In re Grand Jury Subpoena No. 11116275*,

846 F. Supp. 2d 1 (D.D.C. 2012); *Malibu Media, LLC v. John Does 1-16*, 902 F. Supp. 2d 690 (E.D. Pa. 2012).

Mich.—*Ghanam v. Does*, 303 Mich. App. 522, 845 N.W.2d 128 (2014), appeal denied, 497 Mich. 930, 856 N.W.2d 691 (2014).

N.J.—*Warren Hosp. v. Does 1-10*, 430 N.J. Super. 225, 63 A.3d 246 (App. Div. 2013).

S.C.—*State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013).

U.S.—*In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011).

A.L.R. Library

Right of Corporation, Absent Specific Statutory Subpoena Power, to Disclosure of Identity of Anonymous or Pseudonymous Internet User, 120 A.L.R.5th 195.

Cal.—*Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231 (6th Dist. 2008).

Mich.—*Ghanam v. Does*, 303 Mich. App. 522, 845 N.W.2d 128 (2014), appeal denied, 497 Mich. 930, 856 N.W.2d 691 (2014).

N.Y.—*Deer Consumer Products, Inc. v. Little*, 35 Misc. 3d 374, 938 N.Y.S.2d 767 (Sup 2012).

Not subject to frivolous suits to unmask

Md.—*Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009).

N.H.—*Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 160 N.H. 227, 999 A.2d 184 (2010).

U.S.—*Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008).

A.L.R. Library

Individual and Corporate Liability for Libel and Slander in Electronic Communications, Including E-mail, Internet and Websites, 3 A.L.R.6th 153.

Cal.—*Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231 (6th Dist. 2008).

Tex.—*In re Does 1-10*, 242 S.W.3d 805 (Tex. App. Texarkana 2007).

A.L.R. Library

Claims for Vicarious and Individual Liability for Infliction of Emotional Distress Derived from Use of Internet and Electronic Communications, 30 A.L.R.6th 241.

U.S.—*In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1 (D.D.C. 2012).

U.S.—*Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 79 Fed. R. Serv. 3d 203 (D.D.C. 2011); *John Wiley & Sons, Inc. v. Doe Nos. 1-30*, 284 F.R.D. 185 (S.D. N.Y. 2012).

Protection yields to copyright infringement

U.S.—*Arista Records, LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010); *Maverick Entertainment Group, Inc. v. Does 1-2,115*, 810 F. Supp. 2d 1 (D.D.C. 2011); *Achte/Neunte Boll Kino Beteiligungs Gmbh & Co. v. Does 1-4,577*, 736 F. Supp. 2d 212 (D.D.C. 2010).

U.S.—*Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010).

16B C.J.S. Constitutional Law § 1043

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

8. Internet

§ 1043. Internet domain names

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2152

Internet domain names may constitute speech protected by the First Amendment guaranty of freedom of speech and freedom of the press.

An Internet domain name is neither automatically entitled to nor excluded from the speech protections of the First Amendment.¹ An Internet domain name may be considered commercial speech for First Amendment purposes, if it is an advertisement of some form, it refers to a specific product, and the speaker has an economic motivation for the speech.² The extent of the First Amendment's protection of an Internet domain name is based upon whether the domain names are communicative or appear to identify the source of the communication.³ The First Amendment does not protect a misleading use of marks in domain names to attract an unwitting and possibly unwilling audience to the user's message,⁴ and a preliminary injunction against the use of domain names for websites that are confusingly similar to famous marks is not a prior restraint on free speech.⁵

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Footnotes

- 1 U.S.—*Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1032 (D. Kan. 2006).
- 2 U.S.—*Gibson v. Texas Dept. of Ins.—Div. of Workers' Compensation*, 700 F.3d 227 (5th Cir. 2012); *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1032 (D. Kan. 2006).
- 3 U.S.—*Web-adviso v. Trump*, 927 F. Supp. 2d 32 (E.D. N.Y. 2013), appeal dismissed, (2nd Cir. 13-1162) (July 17, 2013).
- Not three-letter generic Top Level Domains**
- U.S.—*Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000).
- 4 U.S.—*Coca-Cola Co. v. Purdy*, 382 F.3d 774 (8th Cir. 2004); *HER, Inc. v. RE/MAX First Choice, LLC*, 468 F. Supp. 2d 964 (S.D. Ohio 2007).
- Parody usage not protected**
- U.S.—*OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176 (W.D. N.Y. 2000).
- 5 U.S.—*Coca-Cola Co. v. Purdy*, 382 F.3d 774 (8th Cir. 2004).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

a. In General

§ 1044. Violation of right to refrain from speaking

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1503, 1564

The First Amendment guaranty of free speech includes the right to refrain from speaking and or writing, subject only as warranted by the level of state interest required to support the restriction or regulation in the particular context, and violation of the right provides a basis for recovery in tort.

The First Amendment guaranty of free speech includes the right to refrain from speaking at all¹ and to decide what not to say,² or what to write,³ including statements the speaker would rather avoid making⁴ or opposes,⁵ thus protecting against not only prohibitions of speech but also compulsions of speech.⁶

The right against compelled speech is not restricted to ideological messages⁷ and extends as well to compelled statements of fact.⁸

Tort claims founded on a violation of the right not to speak generally rest on the civil rights laws as an avenue for enforcement of the right or for damages caused by deprivation of the right,⁹ and while the violation occurs only in the context of actual compulsion, the threat need not be direct.¹⁰

Laws impinging on the right not to speak receive different levels of constitutional scrutiny depending on the type of regulation and the justifications or purposes underlying them; the courts look to the context of the regulation to determine whether the state's regulatory authority has extended too far.¹¹ Content-based regulations are presumptively invalid and subject to strict scrutiny for compelling state interests while regulations in areas traditionally subject to government regulation typically receive a lower level of review.¹² A regulation compelling speech is by its very nature content-based, typically requiring strict scrutiny, because it requires the speaker to change the content of speech or even to say something when the speaker would otherwise be silent; compelled speech is particularly suspect because it can directly affect listeners as well as speakers.¹³ Mandating speech that a speaker would not otherwise make, at least in a noncommercial context, necessarily alters the content of the speech, making the mandate content-based and warranting strict scrutiny.¹⁴

A claimed violation of the right not to speak necessarily first requires the court to determine whether the challenged action implicates the right at all.¹⁵ Compelled disclosures required in a commercial regulatory context generally need only survive a lower level of scrutiny.¹⁶

The First Amendment right to refrain from speaking does not extend to all contexts and does not extend to a right not to speak to a law enforcement officer in the context of a lawful police investigative stop; it thus does not provide the basis for a constitutional tort action in that context.¹⁷ A requirement for convicted prison inmates to admit their guilt of the sexual offense of which they were convicted, as a condition of participating in a rehabilitation program, is not a violation of the inmates' First Amendment rights providing a basis for a constitutional tort claim, given the limited constitutional rights retained by inmates.¹⁸

Laws compelling certain disclosures in the context of abortion practice, ostensibly predicated on the government's interest in protecting the health of pregnant women, have not survived strict scrutiny¹⁹ and thus provide the basis for a constitution tort action for the deprivation of First Amendment rights.²⁰

A threat of criminal charges as a compulsion to attend an education program that would require writing an essay on how a threatened student's acts were wrong violated the student's right to be free from compelled speech, providing the basis for a constitutional tort action.²¹

CUMULATIVE SUPPLEMENT

Cases:

Freedom of speech includes both the right to speak freely and the right to refrain from speaking at all. [U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 \(2018\).](#)

An individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated. [U.S.C.A. Const.Amend. 1. Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 \(2011\).](#)

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Footnotes

- 1 U.S.—*Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); *Frudden v. Pilling*, 742 F.3d 1199, 302 Ed. Law Rep. 21 (9th Cir. 2014); *Full Value Advisors, LLC v. S.E.C.*, 633 F.3d 1101 (D.C. Cir. 2011).
Iowa—*State v. Musser*, 721 N.W.2d 734 (Iowa 2006).
Right not to speak publicly
S.C.—*Disabato v. South Carolina Ass'n of School Adm'rs*, 404 S.C. 433, 746 S.E.2d 329 (2013).
State constitutional basis
Cal.—*Beeman v. Anthem Prescription Management, LLC*, 58 Cal. 4th 329, 165 Cal. Rptr. 3d 800, 315 P.3d 71 (2013).
- 2 U.S.—*Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015).
- 3 U.S.—*Miller v. Mitchell*, 598 F.3d 139, 73 A.L.R.6th 719 (3d Cir. 2010).
- 4 U.S.—*Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015).
- 5 U.S.—*Full Value Advisors, LLC v. S.E.C.*, 633 F.3d 1101 (D.C. Cir. 2011).
- 6 U.S.—*Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); *Miller v. Mitchell*, 598 F.3d 139, 73 A.L.R.6th 719 (3d Cir. 2010); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015).
- 7 U.S.—*Frudden v. Pilling*, 742 F.3d 1199, 302 Ed. Law Rep. 21 (9th Cir. 2014); *National Ass'n of Mfrs. v. N.L.R.B.*, 717 F.3d 947 (D.C. Cir. 2013) (overruled on other grounds by, *American Meat Institute v. U.S. Dept. of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014)).
- 8 U.S.—*McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); *Frudden v. Pilling*, 742 F.3d 1199, 302 Ed. Law Rep. 21 (9th Cir. 2014).
Cal.—*Beeman v. Anthem Prescription Management, LLC*, 58 Cal. 4th 329, 165 Cal. Rptr. 3d 800, 315 P.3d 71 (2013).
- 9 U.S.—*Miller v. Mitchell*, 598 F.3d 139, 73 A.L.R.6th 719 (3d Cir. 2010); *Koch v. City of Del City*, 660 F.3d 1228 (10th Cir. 2011).
- 10 U.S.—*Miller v. Mitchell*, 598 F.3d 139, 73 A.L.R.6th 719 (3d Cir. 2010).
- 11 U.S.—*Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015).
- 12 U.S.—*Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015).
- 13 U.S.—*Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015); *Tepeyac v. Montgomery County*, 5 F. Supp. 3d 745 (D. Md. 2014).
- 14 U.S.—*Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).
- 15 U.S.—*Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008); *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2010).
- 16 U.S.—*Full Value Advisors, LLC v. S.E.C.*, 633 F.3d 1101 (D.C. Cir. 2011).
Cal.—*Beeman v. Anthem Prescription Management, LLC*, 58 Cal. 4th 329, 165 Cal. Rptr. 3d 800, 315 P.3d 71 (2013).
- 17 U.S.—*Koch v. City of Del City*, 660 F.3d 1228 (10th Cir. 2011).
- 18 U.S.—*Newman v. Beard*, 617 F.3d 775 (3d Cir. 2010).
- 19 U.S.—*Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015); *Tepeyac v. Montgomery County*, 5 F. Supp. 3d 745 (D. Md. 2014); *Planned Parenthood*

of Heartland v. Heineman, 724 F. Supp. 2d 1025 (D. Neb. 2010); Planned Parenthood Minnesota, North
Dakota, South Dakota v. Dugaard, 799 F. Supp. 2d 1048 (D.S.D. 2011).
20 U.S.—Planned Parenthood of Heartland v. Heineman, 724 F. Supp. 2d 1025 (D. Neb. 2010).
21 U.S.—Miller v. Mitchell, 598 F.3d 139, 73 A.L.R.6th 719 (3d Cir. 2010).

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16B C.J.S. Constitutional Law § 1045

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

a. In General

§ 1045. Invasion of privacy or "false light" publicity

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1627

The First Amendment guaranty of free speech and press provides a defense to an action for invasion of privacy in limited contexts, including "false light" publicity actions; the First Amendment generally protects the disclosure of events of legitimate concern to the public regardless of falsity or accuracy.

The First Amendment guaranty of free speech and press provides a defense to an action for invasion of privacy in limited contexts,¹ including an action for a "false light" invasion of privacy by publicity.² The bar does not, however, apply in all contexts, and liability may be imposed for abuses.³ A "false light" claim is not barred when established on a showing that the information would be highly offensive to reasonable person and that the publisher acted with actual malice, intending or recklessly failing to anticipate that readers would construe the matter as conveying actual facts or events concerning the plaintiff.⁴

The disclosure of events of legitimate concern to the public is protected by the First Amendment against claims of infringement of the right to privacy,⁵ particularly when publication of accurate reports of judicial proceedings is concerned,⁶ notwithstanding the inaccuracy or falseness of the report.⁷ The privilege extends beyond the dissemination of news to information concerning phases of human activity even when the individuals thus exposed did not seek or have attempted to avoid publicity.⁸

Actions by a public figure for invasion of privacy are constitutionally barred to the same extent as actions for defamation.⁹

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Footnotes

- 1 U.S.—Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).
Okla.—Grogan v. KOKH, LLC, 2011 OK CIV APP 34, 256 P.3d 1021 (Div. 2 2011).
A.L.R. Library
Expectation of Privacy in and Discovery of Social Networking Web Site Postings and Communications, 88 A.L.R.6th 319.
Invasion of Privacy by Using or Obtaining E-Mail or Computer Files, 68 A.L.R.6th 331.
- 2 U.S.—Peoples Bank and Trust Co. of Mountain Home v. Globe Intern. Pub., Inc., 978 F.2d 1065 (8th Cir. 1992); Weyrich v. New Republic, Inc., 235 F.3d 617 (D.C. Cir. 2001) (applying District of Columbia law); Schmitz v. Village of Breckenridge, 2009 WL 3872142 (E.D. Mich. 2009).
Mich.—Battaglieri v. Mackinac Center For Public Policy, 261 Mich. App. 296, 680 N.W.2d 915, 188 Ed. Law Rep. 497 (2004).
Okla.—Grogan v. KOKH, LLC, 2011 OK CIV APP 34, 256 P.3d 1021 (Div. 2 2011).
Bar coextensive with defamation action
Ohio—Welling v. Weinfeld, 113 Ohio St. 3d 464, 2007-Ohio-2451, 866 N.E.2d 1051 (2007).
Bar applies to mere opinions
Ill.—Brennan v. Kadner, 351 Ill. App. 3d 963, 286 Ill. Dec. 725, 814 N.E.2d 951 (1st Dist. 2004).
A.L.R. Library
False light invasion of privacy—defenses and remedies, 57 A.L.R.4th 244.
False light invasion of privacy, cognizability and elements, 57 A.L.R.4th 22.
- 3 Okla.—Grogan v. KOKH, LLC, 2011 OK CIV APP 34, 256 P.3d 1021 (Div. 2 2011).
- 4 U.S.—Peoples Bank and Trust Co. of Mountain Home v. Globe Intern. Pub., Inc., 978 F.2d 1065 (8th Cir. 1992).
Elements for tort recovery
Ohio—Welling v. Weinfeld, 113 Ohio St. 3d 464, 2007-Ohio-2451, 866 N.E.2d 1051 (2007).
Okla.—Grogan v. KOKH, LLC, 2011 OK CIV APP 34, 256 P.3d 1021 (Div. 2 2011).
- 5 U.S.—Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964); Lowe v. Hearst Communications, Inc., 414 F. Supp. 2d 669 (W.D. Tex. 2006), judgment aff'd, 487 F.3d 246 (5th Cir. 2007).
- 6 U.S.—Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).
- 7 U.S.—Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).
- 8 U.S.—Lowe v. Hearst Communications, Inc., 414 F. Supp. 2d 669 (W.D. Tex. 2006), judgment aff'd, 487 F.3d 246 (5th Cir. 2007).
- 9 U.S.—Nichols v. Moore, 396 F. Supp. 2d 783 (E.D. Mich. 2005), aff'd, 477 F.3d 396, 2007 FED App. 0068P (6th Cir. 2007).
Ohio—Welling v. Weinfeld, 113 Ohio St. 3d 464, 2007-Ohio-2451, 866 N.E.2d 1051 (2007).
As to defamation actions against public figures, see § 1053, § 1054.

16B C.J.S. Constitutional Law § 1046

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

a. In General

§ 1046. Invasion of right of publicity

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1630

The protections afforded by the First Amendment guaranty of free speech and press extend to truthful information about a public figure but are lessened or removed to the extent that the uses are purely commercial in relation to another's name or image without transformative or expressive content, permitting an action under a right to publicity theory.

The First Amendment guaranty of free speech and press extends to truthful information about a public figure, rendering the conduct nonactionable under a right to publicity theory, since the value of the speaker's free expression outweighs the subject's right of publicity in these circumstances, at least as to truly expressive works.¹ The classification of the disputed speech or publicity as mere commercial speech lowers the threshold of constitutional protection afforded the speech although an inextricable intertwining of commercial and noncommercial elements will require a higher level of constitutional scrutiny.² Extending the protections afforded noncommercial status from a protected work to advertising for that work is justified only to the extent necessary to safeguard the ability to truthfully promote protected speech.³

In some state-law "right to publicity" actions, the test of whether a public figure's right of publicity prevails over the First Amendment right of another turns on whether the work is transformative in the sense of adding significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation and thus warranting First Amendment protection.⁴ The claim is also subject to a public interest defense, barring a cause of action if the publication of the matter is in the public interest as resting on the public's right to know and encompassing not only news stories on current events but also entertainment features.⁵ The interest in safeguarding the integrity of the First Amendment protections weighs heavily in a balancing inquiry related to the interest in safeguarding the right of publicity and the interest in safeguarding free expression.⁶

The right of action may also be characterized as one for the misappropriation of a person's name or likeness, similarly turning on whether the usage is for the purpose of communicating news or information of public concern, as opposed to the purpose of marketing a product or service, the latter being unprotected.⁷ A claim of commercial appropriation is thus generally subject to a "newsworthiness" exception to the right of publicity, bringing the content within the protection of the First Amendment.⁸

Commercial parody is protected by the First Amendment, recognizing a parody exception to a state's right of publicity statute.⁹

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Footnotes

- 1 U.S.—*Charles v. City of Los Angeles*, 697 F.3d 1146 (9th Cir. 2012), cert. denied, 133 S. Ct. 2339, 185 L. Ed. 2d 1064 (2013).
- 2 U.S.—*Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014) (applying Illinois law and federal Lanham Act).
- 3 U.S.—*Charles v. City of Los Angeles*, 697 F.3d 1146 (9th Cir. 2012), cert. denied, 133 S. Ct. 2339, 185 L. Ed. 2d 1064 (2013).
Test for adjunct advertising usage
U.S.—*Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181 (C.D. Cal. 2011), aff'd, 462 Fed. Appx. 709 (9th Cir. 2011) (applying California law).
- 4 U.S.—*Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), cert. dismissed, 135 S. Ct. 43, 189 L. Ed. 2d 894 (2014) (applying New Jersey law); *Davis v. Electronic Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015) (applying California law).
Cal.—*Ross v. Roberts*, 222 Cal. App. 4th 677, 166 Cal. Rptr. 3d 359 (2d Dist. 2013), review denied, (Apr. 16, 2014).
Test for primarily commercial use
U.S.—*Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) (applying California law).
Mo.—*Doe v. McFarlane*, 207 S.W.3d 52 (Mo. Ct. App. E.D. 2006).
A.L.R. Library
Invasion of privacy by use of plaintiff's name or likeness for nonadvertising purposes, 30 A.L.R.3d 203 (sec. 18 superseded in part *Right of exonerated arrestee to have fingerprints, photographs, or other criminal identification or arrest records expunged or restricted*, 46 A.L.R.3d 900 (sec. 11 superseded in part *False light invasion of privacy—accusation or innuendo as to criminal acts*, 58 A.L.R.4th 902)).
Invasion of privacy by use of plaintiff's name or likeness in advertising, 23 A.L.R.3d 865.
- 5 U.S.—*Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181 (C.D. Cal. 2011), aff'd, 462 Fed. Appx. 709 (9th Cir. 2011) (applying California law).
- 6 U.S.—*Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), cert. dismissed, 135 S. Ct. 43, 189 L. Ed. 2d 894 (2014) (applying New Jersey law); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) (applying California law).
- 7 U.S.—*Hill v. Public Advocate of the United States*, 35 F. Supp. 3d 1347 (D. Colo. 2014) (applying Colorado law); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010) (applying Washington law).

Mich.—[Battaglieri v. Mackinac Center For Public Policy](#), 261 Mich. App. 296, 680 N.W.2d 915, 188 Ed. Law Rep. 497 (2004).

Significant expressive elements added

U.S.—[Moore v. Weinstein Co., LLC](#), 545 Fed. Appx. 405 (6th Cir. 2013) (applying Tennessee and Arizona law).

8 U.S.—[Fraleley v. Facebook, Inc.](#), 830 F. Supp. 2d 785 (N.D. Cal. 2011) (applying California law).

9 Cal.—[Ross v. Roberts](#), 222 Cal. App. 4th 677, 166 Cal. Rptr. 3d 359 (2d Dist. 2013), review denied, (Apr. 16, 2014).

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16B C.J.S. Constitutional Law § 1047

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

a. In General

§ 1047. First amendment defense to intentional infliction of emotional distress

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1620, 1628, 2160 to 2175

The First Amendment guaranty of free speech and press requires that a public figure or official asserting a claim for intentional infliction of emotional distress based on a defamatory statement or publication prove actual malice, knowledge of falsity, or reckless disregard of truth; the requirement of malice does not apply to actions by private individuals.

The free speech clause of the First Amendment can serve as a defense in state tort claims for intentional infliction of emotional distress,¹ but the claim can survive a First Amendment challenge when the statement or publication is factual, false, and made with malice.²

In an action by a public figure or public official claiming intentional infliction of emotional distress, based on an alleged defamatory publication, the plaintiff must prove that the publication was made with actual malice, meaning knowledge that the

statement was false or with reckless disregard as to whether or not it was true.³ A publication in the nature of a parody that cannot be reasonably understood to describe actual facts or events does not meet the test.⁴

Mere expressions of opinion do not remove allegedly defamatory statements regarding a public figure or official from the protections of the First Amendment in a claim for intentional infliction of emotional distress.⁵

In a private-speech context, not involving public figures or officials, the imposition of tort liability in damages for speech constituting the intentional infliction of emotional distress by defamation is not a violation of the First Amendment.⁶

CUMULATIVE SUPPLEMENT

Cases:

The Free Speech Clause of the First Amendment can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress. [U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 \(2011\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 \(2011\).](#)
[Tex.—Nelson v. Pagan, 377 S.W.3d 824 \(Tex. App. Dallas 2012\).](#)
- 2 [U.S.—Holloway v. American Media, Inc., 947 F. Supp. 2d 1252 \(N.D. Ala. 2013\).](#)
- 3 [U.S.—Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 \(1988\); Fiacco v. Sigma Alpha Epsilon Fraternity, 528 F.3d 94, 233 Ed. Law Rep. 56 \(1st Cir. 2008\); Tharp v. Media General, Inc., 987 F. Supp. 2d 673 \(D.S.C. 2013\).](#)
As to the standard in actions for libel or slander, see § 1053.
- 4 [U.S.—Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 \(1988\).](#)
- 5 [U.S.—Farah v. Esquire Magazine, 736 F.3d 528 \(D.C. Cir. 2013\).](#)
[Pa.—Jones v. City of Philadelphia, 893 A.2d 837 \(Pa. Commw. Ct. 2006\).](#)
- 6 [U.S.—Araya v. Deep Dive Media, LLC, 966 F. Supp. 2d 582 \(W.D. N.C. 2013\).](#)
[Cal.—Brekke v. Wills, 125 Cal. App. 4th 1400, 23 Cal. Rptr. 3d 609 \(3d Dist. 2005\).](#)
Action sustainable
[U.S.—Holloway v. American Media, Inc., 947 F. Supp. 2d 1252 \(N.D. Ala. 2013\).](#)

16B C.J.S. Constitutional Law § 1048

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

b. Defamation

§ 1048. Defamation principles

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2160 to 2175

The First Amendment guaranty of free speech and press requires that liability for defamation be predicated on verifiably, demonstrably false statements, susceptible of proof as such, and not mere opinion or hyperbole.

Under First Amendment freedom of speech protections, in addition to the varying standards of state of mind applicable depending on whether the plaintiff is a public figure or official,¹ or a private individual,² a defendant cannot be held liable for defamation unless the alleged defamatory statement or implied premise is verifiable, reasonably capable of defamatory meaning, and not so imprecise or subjective that it is incapable of being proved true or false.³ Statements about matters of public concern not capable of being proven true or false, and statements that cannot be interpreted reasonably as stating facts, are protected from defamation actions under the First Amendment.⁴

The First Amendment provides protection for rhetorical hyperbole, vigorous epithets, and loose figurative or hyperbolic language,⁵ as it cannot reasonably be interpreted as stating actual, provable facts about individual for purposes of defamation.⁶

Free speech protection from defamation claims extends to parody, fantasy, rhetorical hyperbole, and imaginative expressions that cannot reasonably be interpreted as stating actual facts about an individual.⁷

The expression of opinion is not of itself sufficient to support an action for defamation,⁸ no matter how unjustified, unreasonable, or derogatory the opinion is.⁹ An opinion loses its First Amendment protection and becomes actionable as defamatory when it is based on implied, undisclosed facts and the speaker has no factual basis for the opinion¹⁰ or when the speaker expressly states defamatory matters as facts in support of assertions that might otherwise constitute mere opinions.¹¹

CUMULATIVE SUPPLEMENT

Cases:

The appropriate balance is achieved between defamation by implication plaintiffs and a defendant's First Amendment protection for publishing substantially truthful statements by requiring the plaintiff to make a rigorous showing about the false implications alleged and the defendant's intent or endorsement of that falsity; the language must (1) be reasonably understood to impart the false innuendo, and (2) affirmatively suggest that the author intends or endorses the inference. [U.S. Const. Amend. 1. Verity v. USA Today](#), 436 P.3d 653 (Idaho 2019).

In cases where exaggerated political rhetoric is determined not to be actionable as defamation under the First Amendment, it is because there are no specific verifiable assertions of fact underlying those statements. [U.S. Const. Amend. 1. Tirio v. Dalton](#), 2019 IL App (2d) 181019, 437 Ill. Dec. 671, 144 N.E.3d 1261 (App. Ct. 2d Dist. 2019), appeal allowed, 435 Ill. Dec. 701, 140 N.E.3d 259 (Ill. 2020), order vacated, 2020 WL 5637613 (Ill. 2020) and appeal dismissed as improvidently allowed, 2020 WL 5637613 (Ill. 2020).

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Footnotes

- 1 § 1050.
- 2 § 1049.
- 3 U.S.—[Farah v. Esquire Magazine](#), 736 F.3d 528 (D.C. Cir. 2013).
Fact statement provably false
 U.S.—[Piping Rock Partners, Inc. v. David Lerner Associates, Inc.](#), 946 F. Supp. 2d 957 (N.D. Cal. 2013).
Actual facts required
 Ill.—[Hadley v. Doe](#), 2014 IL App (2d) 130489, 382 Ill. Dec. 75, 12 N.E.3d 75 (App. Ct. 2d Dist. 2014), appeal allowed, (Sept. 24, 2014).
 U.S.—[Turkish Coalition of America, Inc. v. Bruininks](#), 678 F.3d 617, 279 Ed. Law Rep. 591 (8th Cir. 2012).
 Minn.—[Rochester City Lines, Co. v. City of Rochester](#), 846 N.W.2d 444 (Minn. Ct. App. 2014), review granted (June 17, 2014).
 U.S.—[CACI Premier Technology, Inc. v. Rhodes](#), 536 F.3d 280, 40 A.L.R.6th 649 (4th Cir. 2008).
 Mich.—[Ghanam v. Does](#), 303 Mich. App. 522, 845 N.W.2d 128 (2014) appeal denied, 497 Mich. 930, 856 N.W.2d 691 (2014).
 Wash.—[Duc Tan v. Le](#), 177 Wash. 2d 649, 300 P.3d 356 (2013), cert. denied, 134 S. Ct. 941, 187 L. Ed. 2d 784 (2014).
 U.S.—[CACI Premier Technology, Inc. v. Rhodes](#), 536 F.3d 280, 40 A.L.R.6th 649 (4th Cir. 2008); [Adelson v. Harris](#), 973 F. Supp. 2d 467 (S.D. N.Y. 2013).
- 4
- 5
- 6

Ill.—*Jacobson v. Gimbel*, 2013 IL App (2d) 120478, 369 Ill. Dec. 626, 986 N.E.2d 1262 (App. Ct. 2d Dist. 2013), appeal denied, 374 Ill. Dec. 567, 996 N.E.2d 14 (Ill. 2013).

Mich.—*Ghanam v. Does*, 303 Mich. App. 522, 845 N.W.2d 128 (2014) appeal denied, 497 Mich. 930, 856 N.W.2d 691 (2014).

7 U.S.—*Mink v. Knox*, 613 F.3d 995 (10th Cir. 2010).

8 U.S.—*Piping Rock Partners, Inc. v. David Lerner Associates, Inc.*, 946 F. Supp. 2d 957 (N.D. Cal. 2013).

Mich.—*Ghanam v. Does*, 303 Mich. App. 522, 845 N.W.2d 128 (2014) appeal denied, 497 Mich. 930, 856 N.W.2d 691 (2014).

Minn.—*Rochester City Lines, Co. v. City of Rochester*, 846 N.W.2d 444 (Minn. Ct. App. 2014), review granted (June 17, 2014).

Test for nonactionable opinions

U.S.—*Gardner v. Martino*, 563 F.3d 981 (9th Cir. 2009).

9 U.S.—*Adelson v. Harris*, 973 F. Supp. 2d 467 (S.D. N.Y. 2013).

10 U.S.—*Piping Rock Partners, Inc. v. David Lerner Associates, Inc.*, 946 F. Supp. 2d 957 (N.D. Cal. 2013).

11 Wash.—*Duc Tan v. Le*, 177 Wash. 2d 649, 300 P.3d 356 (2013), cert. denied, 134 S. Ct. 941, 187 L. Ed. 2d 784 (2014).

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16B C.J.S. Constitutional Law § 1049

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

b. Defamation

§ 1049. Defamation standards for private individuals

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2160 to 2175

In a private-speech context, not involving public figures or officials, tort liability for speech constituting defamation is not a violation of the First Amendment but proof of a false statement is required and negligence may suffice.

In a defamation action, when a plaintiff is a private figure and the speech is a matter of public concern, the First Amendment requires the plaintiff to prove the falsity of the statement,¹ but when the speech does not involve matters of public concern, the state interest adequately supports awards of damages even in the absence of actual malice.² Negligence will suffice as the basis of liability for defamation.³

In a private speech context, expressions of mere opinion are privileged under the First Amendment and do not provide a basis of liability for defamation.⁴

Punitive damages.

Permitting the recovery of punitive damages in private speech defamation cases absent a showing of actual malice does not violate the First Amendment when the defamatory statements do not involve matters of public concern.⁵

CUMULATIVE SUPPLEMENT

Cases:

Former husband and wife's internet posts, stating that wife's attorney in divorce proceedings lied about amount of attorney's fee and falsified contract, were not statements of opinion protected by First Amendment, but were factual allegations and, thus, provided basis for attorney's libel action in which evidence showed the posts were false. [U.S.C.A. Const.Amend. 1. Blake v. Giustibelli, 182 So. 3d 881 \(Fla. 4th DCA 2016\)](#), review denied, [2016 WL 869895 \(Fla. 2016\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 \(1986\); Mink v. Suthers, 482 F.3d 1244 \(10th Cir. 2007\); Farah v. Esquire Magazine, 736 F.3d 528 \(D.C. Cir. 2013\). Pa.—\[Joseph v. Scranton Times, L.P., 2014 PA Super 49, 89 A.3d 251 \\(2014\\)\]\(#\), appeal granted, \[105 A.3d 655 \\(Pa. 2014\\)\]\(#\).](#)
- 2 U.S.—[Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 \(1985\); Farah v. Esquire Magazine, 736 F.3d 528 \(D.C. Cir. 2013\)](#).
- 3 U.S.—[Mangual v. Rotger-Sabat, 317 F.3d 45 \(1st Cir. 2003\); Farah v. Esquire Magazine, 736 F.3d 528 \(D.C. Cir. 2013\)](#).
- 4 U.S.—[Obsidian Finance Group, LLC v. Cox, 740 F.3d 1284 \(9th Cir. 2014\)](#), cert. denied, [134 S. Ct. 2680, 189 L. Ed. 2d 223 \(2014\); Loftus v. Nazari, 21 F. Supp. 3d 849 \(E.D. Ky. 2014\)](#).
- 5 U.S.—[Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 \(1985\)](#).

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16B C.J.S. Constitutional Law § 1050

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

b. Defamation

§ 1050. Defamation standards for public figures or officials

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2160 to 2175

The First Amendment guaranty of free speech and press requires that a public official or public figure asserting a claim for defamation prove actual malice, knowledge of falsity, or reckless disregard of truth.

The First Amendment guaranty of free speech and press requires that, when a statement of opinion on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that the statements were made with knowledge of their false implications or with reckless disregard of truth in order to recover.¹ Mere negligence, misstatement, or falsity are not sufficient.²

Generally, for purposes of a defamation action, those who attain public figure status have either assumed roles of special prominence in society³ or placed themselves in the forefront of a particular issue; public figures effectively have assumed the risk of potential unfair criticism by entering into public arena and engaging the public's attention.⁴ An individual is not a public

figure for all purposes absent clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society.⁵

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Footnotes

- 1 U.S.—[Milkovich v. Lorain Journal Co.](#), 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1, 60 Ed. Law Rep. 1061 (1990); [Dongguk University v. Yale University](#), 734 F.3d 113, 298 Ed. Law Rep. 100 (2d Cir. 2013); [Young v. Gannett Satellite Information Network, Inc.](#), 734 F.3d 544 (6th Cir. 2013).
Pa.—[Joseph v. Scranton Times, L.P.](#), 2014 PA Super 49, 89 A.3d 251 (2014), appeal granted, 105 A.3d 655 (Pa. 2014).
Tex.—[Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.](#), 434 S.W.3d 142 (Tex. 2014).
Wash.—[Duc Tan v. Le](#), 177 Wash. 2d 649, 300 P.3d 356 (2013), cert. denied, 134 S. Ct. 941, 187 L. Ed. 2d 784 (2014).
- 2 U.S.—[Dongguk University v. Yale University](#), 734 F.3d 113, 298 Ed. Law Rep. 100 (2d Cir. 2013).
- 3 U.S.—[Mitre Sports Intern. Ltd. v. Home Box Office, Inc.](#), 22 F. Supp. 3d 240 (S.D. N.Y. 2014); [Franklin Prescriptions, Inc. v. The New York Times Co.](#), 267 F. Supp. 2d 425 (E.D. Pa. 2003).
A.L.R. Library
[Who is "public figure" for purposes of defamation action](#), 19 A.L.R.5th 1.
- 4 U.S.—[Franklin Prescriptions, Inc. v. The New York Times Co.](#), 267 F. Supp. 2d 425 (E.D. Pa. 2003).
- 5 U.S.—[Makaeff v. Trump University, LLC](#), 715 F.3d 254 (9th Cir. 2013).

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16B C.J.S. Constitutional Law § 1051

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

c. Libel or Slander

§ 1051. Libel or slander principles

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1620 to 1630, 2160 to 2176

The First Amendment guaranty of free speech and press limits but does not afford an immunity from liability for libel or slander.

The First Amendment guaranty of free speech and press places limits on the potential for liability in claims of libel, for published speech,¹ or slander, for spoken speech,² but the First Amendment does not preclude liability when the requisite evidentiary basis is established for libel³ or slander.⁴ While libel can claim no talismanic immunity from constitutional limitations,⁵ malicious libel enjoys no constitutional protection in any context.⁶

In a libel action, the scope of liability for defamatory utterances is subject to stringent limitations in view of the fact that the threat or actual imposition of pecuniary liability for an alleged defamation may impair unfettered free political discussion.⁷

Statements of opinion.

In a libel action, although statements of fact may be actionable, statements of opinion are constitutionally protected.⁸ Satirical, hyperbolic, imaginative, or figurative statements are protected by the First Amendment, and are not actionable as libel, because the context and tenor of the statements negate the impression that the author seriously is maintaining an assertion of actual fact.⁹

Judicial proceedings and records.

The publication of accurate reports of judicial proceedings is accorded a special constitutional protection against actions for libel.¹⁰ States are precluded from imposing civil liability for the publication of truthful information obtained in official court records open to public inspection.¹¹ The First Amendment does not, however, protect inaccurate and false statements made in the course of reporting judicial proceedings.¹²

CUMULATIVE SUPPLEMENT

Cases:

Under Pennsylvania law, actual malice is a term of art that does not connote ill will or improper motivation, but rather, it requires that the publisher either know that its article was false or publish it with reckless disregard for its truth; the First Amendment requires this demanding standard. *U.S. Const. Amend. 1. McCafferty v. Newsweek Media Group, Ltd.*, 955 F.3d 352 (3d Cir. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989); *Ashton v. Kentucky*, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964); *Mink v. Knox*, 613 F.3d 995 (10th Cir. 2010).
- 2 U.S.—*Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970); *Mink v. Knox*, 613 F.3d 995 (10th Cir. 2010); *Piccone v. Bartels*, 40 F. Supp. 3d 198 (D. Mass. 2014).
- 3 U.S.—*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989); *DiBella v. Hopkins*, 403 F.3d 102, 66 Fed. R. Evid. Serv. 1104 (2d Cir. 2005); *Mink v. Knox*, 613 F.3d 995 (10th Cir. 2010).
- 4 U.S.—*Taylor v. Carmouche*, 214 F.3d 788 (7th Cir. 2000).
Conn.—*Massad v. Eastern Connecticut Cable Television, Inc.*, 70 Conn. App. 635, 801 A.2d 813 (2002).
Decorum rule not overly broad
U.S.—*Felton v. Griffin*, 185 Fed. Appx. 700 (9th Cir. 2006).
- 5 U.S.—*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).
- 6 U.S.—*Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966).
- 7 U.S.—*Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970).
- 8 Cal.—*Sanders v. Walsh*, 219 Cal. App. 4th 855, 162 Cal. Rptr. 3d 188 (4th Dist. 2013).
Tex.—*Brown v. Swett & Crawford of Texas, Inc.*, 178 S.W.3d 373 (Tex. App. Houston 1st Dist. 2005).

- 9 Cal.—*Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 10 Cal. Rptr. 3d 429 (4th Dist. 2004).
Satirical article not libelous
Tex.—*New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004).
- 10 U.S.—*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).
Divorce decree
U.S.—*Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).
- 11 U.S.—*Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).
- 12 U.S.—*Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).

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16B C.J.S. Constitutional Law § 1052

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

c. Libel or Slander

§ 1052. Libel or slander standards for private individuals

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1620 to 1630, 2160 to 2176

The First Amendment guaranty of free speech and press does not afford an immunity from liability to a private individual, not a public figure or official, for libel or slander.

The First Amendment guaranty of free speech and press does not afford an immunity from liability to a private individual, not a public figure or official, for libel or slander, notwithstanding the fact that the defamatory statements concern issues of public interest.¹ The First Amendment does not permit the imposition of liability without fault but otherwise permits the states to define for themselves the appropriate standard of liability.² While the states may establish a higher standard of liability, negligence is sufficient for liability to a private individual for libel with the constraints of the First Amendment,³ and nonmalicious private libel is not protected.⁴ The First Amendment does not impose on the states any limitations as to how, within their own judicial system, fact-finding tasks are to be allocated in a libel action brought by a private person.⁵

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Footnotes

- 1 U.S.—[Gertz v. Robert Welch, Inc.](#), 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).
No bar under state constitution
Iowa—[Bierman v. Weier](#), 826 N.W.2d 436 (Iowa 2013).
- 2 U.S.—[Gertz v. Robert Welch, Inc.](#), 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).
S.D.—[Sparagon v. Native American Publishers, Inc.](#), 1996 SD 3, 542 N.W.2d 125 (S.D. 1996).
No liability for truthful statements
Mass.—[Shaari v. Harvard Student Agencies, Inc.](#), 427 Mass. 129, 691 N.E.2d 925 (1998).
- 3 Or.—[Bank of Oregon v. Independent News, Inc.](#), 65 Or. App. 29, 670 P.2d 616 (1983), decision *aff'd*, 298 Or. 434, 693 P.2d 35 (1985).
- 4 N.Y.—[Gewurz v. Bernstein](#), 107 Misc. 2d 857, 436 N.Y.S.2d 142 (Sup 1981).
- 5 U.S.—[Time, Inc. v. Firestone](#), 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).

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16B C.J.S. Constitutional Law § 1053

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

c. Libel or Slander

§ 1053. Libel or slander standards for public officials and public figures

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1620 to 1630, 2160 to 2176

The First Amendment guaranty of free speech and press does not afford an immunity from liability to a public figure or public official for libel or slander but liability requires proof of actual malice, meaning knowledge of falsity or reckless disregard of falsity.

In a slander¹ or libel action regarding statements about public figures² and public officials, the defense of truth is constitutionally required,³ and the First Amendment protects just criticism of and comment on the acts and conduct of public officials or public figures against liability for libel or slander.⁴ Criticism of public officials or public figures does not lose its constitutional protection merely because it is an effective criticism and diminishes official reputations.⁵ Neither factual error nor defamatory contents suffice to remove the constitutional protection from the criticism of official conduct, and the combination of the two elements is no less adequate; the protection is not forfeited because the allegedly defamatory statements are published in the form of a paid advertisement which is not a commercial but an editorial advertisement.⁶

The First Amendment bars an award of damages for libel against a public official or a public figure for a defamatory falsehood unless the plaintiff proves actual malice, that is, that the falsehood was published with knowledge of its falsity or with reckless disregard of whether it was true or false.⁷ Actual malice is beyond protection,⁸ but mere negligence does not suffice.⁹

The malice standard rests on the premise that factual error is inevitable in free debate or public discussion and must be countenanced in order to give the freedom of expression a breathing space;¹⁰ the national commitment to the free exchange of ideas as enshrined in the First Amendment demands that the law of libel carve out an area so that protected speech is not discouraged.¹¹

The plaintiff must demonstrate that the author in fact entertained serious doubt as to truth of the publication or acted with a high degree of awareness of its probable falsity.¹² The plaintiff is not barred by the First Amendment from inquiring into the editorial processes and state of mind of those responsible for the publication as when the inquiry will produce evidence material to the proof of a critical element of the plaintiff's cause of action.¹³

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Footnotes

- 1 U.S.—*Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971).
- 2 U.S.—*Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971); *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003).
- 3 U.S.—*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).
Truth defense to slander
U.S.—*Piccone v. Bartels*, 40 F. Supp. 3d 198 (D. Mass. 2014).
- 4 U.S.—*Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971).
- 5 U.S.—*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).
Charge of criminal activity never irrelevant
U.S.—*Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971).
- 6 U.S.—*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).
- 7 U.S.—*Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970).
Mich.—*Ghanam v. Does*, 303 Mich. App. 522, 845 N.W.2d 128 (2014), appeal denied, 497 Mich. 930, 856 N.W.2d 691 (2014).
N.Y.—*Shulman v. Hunderfund*, 12 N.Y.3d 143, 878 N.Y.S.2d 230, 905 N.E.2d 1159, 244 Ed. Law Rep. 275 (2009).
Ohio—*Murray v. Chagrin Valley Publishing Co.*, 2014-Ohio-5442, 25 N.E.3d 1111 (Ohio Ct. App. 8th Dist. Cuyahoga County 2014).
Not actionable slander absent malice
U.S.—*Wynn v. Chanos*, 2014 WL 7186981 (N.D. Cal. 2014); *Piccone v. Bartels*, 40 F. Supp. 3d 198 (D. Mass. 2014); *SCO Group, Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287 (D. Utah 2010).
A.L.R. Library
Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice, 20 A.L.R.3d 988.
- 8 U.S.—*Garrison v. State of La.*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964).
- 9 U.S.—*Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991).
Ohio—*Murray v. Chagrin Valley Publishing Co.*, 2014-Ohio-5442, 25 N.E.3d 1111 (Ohio Ct. App. 8th Dist. Cuyahoga County 2014).
- 10 U.S.—*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).

Mich.—[Ghanam v. Does](#), 303 Mich. App. 522, 845 N.W.2d 128 (2014), appeal denied, 497 Mich. 930, 856 N.W.2d 691 (2014).

Ohio—[Murray v. Chagrin Valley Publishing Co.](#), 2014-Ohio-5442, 25 N.E.3d 1111 (Ohio Ct. App. 8th Dist. Cuyahoga County 2014).

11 U.S.—[Harte-Hanks Communications, Inc. v. Connaughton](#), 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

12 U.S.—[Masson v. New Yorker Magazine, Inc.](#), 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991).

Ohio—[Murray v. Chagrin Valley Publishing Co.](#), 2014-Ohio-5442, 25 N.E.3d 1111 (Ohio Ct. App. 8th Dist. Cuyahoga County 2014).

13 U.S.—[Herbert v. Lando](#), 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115, 3 Fed. R. Evid. Serv. 822, 27 Fed. R. Serv. 2d 1 (1979).

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16B C.J.S. Constitutional Law § 1054

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

9. Tortious Invasion of Protected Rights

c. Libel or Slander

§ 1054. Libel or slander standards for public figures or officials—Persons qualified

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1620 to 1630, 2160 to 2176

For purposes of liability for libel or slander of a public figure or officer, within the constraints of the First Amendment, an individual may become a public figure by choosing pervasive fame or notoriety for all purposes and in all contexts, or by being voluntarily injected or otherwise drawn into a particular public controversy; the public official designation applies to government officers and employees with substantial responsibility for or control over the conduct of governmental affairs.

For purposes of establishing another party's liability for libel or slander of a public figure or public officer, requiring proof of actual malice under the First Amendment guaranty of free speech and press,¹ candidates for a public office are public figures.² Public officials include many government employees, though not all.³ The public official designation in a civil libel context applies to those government employees who have, or appear to the public to have, a substantial responsibility for or control over the conduct of governmental affairs.⁴

Those who have voluntarily sought and attained influence or prominence in matters of social concern are generally considered public figures for this purpose.⁵ The individual's status may be voluntary or may be the result of being drawn into a particular public controversy, becoming a public figure for limited purposes.⁶ Participants in some litigation may be legitimate public figures either generally or for the limited purpose of that litigation.⁷ While ordinary citizens can be transformed into public figures under the First Amendment for purposes of a libel action, participation in public affairs or holding a role of prominence does not, in and of itself, automatically make that happen, nor does simply receiving public funds; rather, in determining whether ordinary citizen has become public figure, court must look to nature and extent of individual's participation in controversy.⁸ Public figure status was not deemed appropriate for the wife of the scion of a wealthy family on that basis alone.⁹

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Footnotes

- 1 § 1053.
- 2 U.S.—*Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971); *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003).
S.D.—*Krueger v. Austad*, 1996 SD 26, 545 N.W.2d 205 (S.D. 1996).
- 3 U.S.—*Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003).
- 4 U.S.—*Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966).
S.D.—*Krueger v. Austad*, 1996 SD 26, 545 N.W.2d 205 (S.D. 1996).
- 5 U.S.—*Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163 (2d Cir. 2000).
Utah—*Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, 116 P.3d 271 (Utah 2005).
Championship boxer
U.S.—*Cobb v. Time, Inc.*, 278 F.3d 629, 2002 FED App. 0040P (6th Cir. 2002).
Corporate Chief Executive Officer
U.S.—*Wynn v. Chanos*, 2014 WL 7186981 (N.D. Cal. 2014).
Church
U.S.—*Church of Scientology Intern. v. Behar*, 238 F.3d 168 (2d Cir. 2001).
- 6 U.S.—*Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966).
Utah—*Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, 116 P.3d 271 (Utah 2005).
- 7 U.S.—*Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).
Convicted killer of national civil rights leader
U.S.—*Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1280 (6th Cir. 1978).
Copyright transferee
U.S.—*SCO Group, Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287 (D. Utah 2010).
- 8 S.D.—*Krueger v. Austad*, 1996 SD 26, 545 N.W.2d 205 (S.D. 1996).
- 9 U.S.—*Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).

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16B C.J.S. Constitutional Law § 1055

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

10. Labor Matters in Private Employment

§ 1055. Labor organizations or unions First Amendment rights

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1905 to 1924

The First Amendment guaranty of free speech and press extends to labor organizations or unions and their related activities or communications in the context of private employment.

Labor organizations or unions have the right under the First Amendment to express their views on political and social issues without government interference,¹ including the rights of unions and union members to express themselves about union matters free of government coercion.² State and federal statutory law may single out labor-related speech for particular protection or regulation, in the context of a statutory system of economic regulation of labor relations, without violating the First Amendment.³

While free speech extends to some labor union activities,⁴ it does not encompass all union activities,⁵ and the First Amendment is not a substitute for the regulation of labor practices under the national labor relations laws.⁶

The government may not discriminate among those it will hear on the basis of the speaker's status as a labor organization rather than an individual employee.⁷ The circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater sanction or render it completely inviolable.⁸

The First Amendment guarantees the right to join a union and to advocate in favor of unionization,⁹ and right to solicit union membership is protected by the right of freedom of speech and of the press.¹⁰

A state right-to-work statute, prohibiting union-security arrangements that require membership in unions, does not abridge a union's First Amendment right to free speech.¹¹

In non-right-to-work states, the establishment of an "agency shop" that exacts compulsory union fees as a condition of employment, affecting a dissenting employee thereby forced to financially support an organization despite disagreements with its demands and principles, constitutes a form of compelled speech significantly impinging on First Amendment rights and requiring a proper balancing of procedures and protections to minimize the infringement, including an opt-out system.¹² A requirement that a nonunion member pay a fee to a union impinges on that individual's First Amendment right of free speech and is permitted only when (1) germane to collective-bargaining activity; (2) justified by the government's vital policy interest in labor peace and avoiding free riders; and (3) not significantly adding to the burden of free speech that is inherent in the allowance of an agency or union shop.¹³ The union bears the burden of establishing that disputed assessments charged to dissenters do not violate the dissenters' First Amendment rights.¹⁴ The First Amendment right of free speech prohibits the assessment of costs of litigation against dissenting employees for litigation that does not concern the dissenters' unit.¹⁵

A union's internal governing rules are usually not subject to First Amendment prohibitions.¹⁶

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Footnotes

- 1 U.S.—*Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012); *Tucker v. City of Fairfield, Ohio*, 398 F.3d 457, 2005 FED App. 0070P (6th Cir. 2005); *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014).
 Colo.—*Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010).
- 2 U.S.—*Lyng v. International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW*, 485 U.S. 360, 108 S. Ct. 1184, 99 L. Ed. 2d 380 (1988).
- 3 Cal.—*Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, 55 Cal. 4th 1083, 150 Cal. Rptr. 3d 501, 290 P.3d 1116 (2012), cert. denied, 133 S. Ct. 2799, 186 L. Ed. 2d 860 (2013).
- 4 U.S.—*Tucker v. City of Fairfield, Ohio*, 398 F.3d 457, 2005 FED App. 0070P (6th Cir. 2005); *United Broth. of Carpenters and Joiners of America Local 586 v. N.L.R.B.*, 540 F.3d 957 (9th Cir. 2008), as corrected, (Oct. 28, 2008); *U.S. v. Larson*, 807 F. Supp. 2d 142 (W.D. N.Y. 2011).
Some acrimonious speech protected
 U.S.—*Smithfield Foods, Inc. v. United Food and Commercial Workers Intern. Union*, 585 F. Supp. 2d 789 (E.D. Va. 2008).
- 5 U.S.—*Stagman v. Ryan*, 176 F.3d 986, 51 Fed. R. Evid. Serv. 1551 (7th Cir. 1999).
No protection for advocating collusive contracts
 U.S.—*U.S. v. International Brotherhood of Teamsters*, 173 L.R.R.M. (BNA) 2065, 2003 WL 21998009 (S.D. N.Y. 2003), aff'd, 110 Fed. Appx. 177 (2d Cir. 2004).
No protection for threats, intimidation, or extortion
 U.S.—*U.S. v. Larson*, 807 F. Supp. 2d 142 (W.D. N.Y. 2011); *Smithfield Foods, Inc. v. United Food and Commercial Workers Intern. Union*, 585 F. Supp. 2d 789 (E.D. Va. 2008).

- 6 U.S.—*Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979).
- 7 U.S.—*Henrico Professional Firefighters Ass'n Local 1568 v. Board of Sup'rs of Henrico County*, 649 F.2d 237 (4th Cir. 1981).
- 8 U.S.—*New Orleans S.S. Ass'n v. General Longshore Workers*, 626 F.2d 455 (5th Cir. 1980), judgment *aff'd*, 457 U.S. 702, 102 S. Ct. 2672, 73 L. Ed. 2d 327 (1982).
- 9 U.S.—*Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945); *Hobbs v. Hawkins*, 968 F.2d 471 (5th Cir. 1992).
- Right to organize and advocate**
- U.S.—*International Ass'n of Machinists and Aerospace Workers v. Haley*, 832 F. Supp. 2d 612 (D.S.C. 2011), *aff'd*, 482 Fed. Appx. 759 (4th Cir. 2012).
- 10 U.S.—*N.L.R.B. v. Daylin, Inc., Discount Div.*, 496 F.2d 484 (6th Cir. 1974).
- 11 U.S.—*Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014).
- 12 U.S.—*Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).
- Procedural safeguards required**
- U.S.—*Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232, 30 Ed. Law Rep. 649 (1986).
- 13 U.S.—*Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S. Ct. 1950, 114 L. Ed. 2d 572, 67 Ed. Law Rep. 421 (1991); *Locke v. Karass*, 498 F.3d 49 (1st Cir. 2007), *aff'd*, 555 U.S. 207, 129 S. Ct. 798, 172 L. Ed. 2d 552 (2009); *Seidemann v. Bowen*, 584 F.3d 104, 249 Ed. Law Rep. 638 (2d Cir. 2009).
- 14 U.S.—*Seidemann v. Bowen*, 584 F.3d 104, 249 Ed. Law Rep. 638 (2d Cir. 2009).
- 15 U.S.—*Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S. Ct. 1950, 114 L. Ed. 2d 572, 67 Ed. Law Rep. 421 (1991).
- 16 U.S.—*Quigley v. Giblin*, 569 F.3d 449 (D.C. Cir. 2009).

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16B C.J.S. Constitutional Law § 1056

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

10. Labor Matters in Private Employment

§ 1056. First Amendment rights of employees

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1905 to 1924

The First Amendment guaranty of free speech is generally inapplicable to private employees in a nonpublic workplace except regarding labor matters.

The First Amendment guaranty of free speech applies to private employees' workplace statements in the context of labor matters,¹ but otherwise the First Amendment guaranty of free speech does not extend to the private workplace,² in contrast to the rights protected for public or government employees when addressing matters of public concern.³ In some jurisdictions, however, there is authority that the public employee rule also applies in a private employment context, extending First Amendment protections to an employee's statements on matters of public concern, even when related to job functions, though not to expressions made as part of the employee's job duties.⁴ Even under the latter view, however, the First Amendment's shield for speech in the workplace does not extend to speech and conduct closely connected with insubordination that impedes an employee's performance of duties or that interferes with the proper functioning of the workplace.⁵

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Footnotes

- 1 §§ 1055, 1058.
- 2 U.S.—*Drake v. Cheyenne Newspapers, Inc.*, 842 F. Supp. 1403 (D. Wyo. 1994).
N.Y.—*Engstrom v. Kinney System, Inc.*, 241 A.D.2d 420, 661 N.Y.S.2d 610 (1st Dep't 1997).
W. Va.—*Tiernan v. Charleston Area Medical Center, Inc.*, 203 W. Va. 135, 506 S.E.2d 578 (1998).
Wyo.—*McGarvey v. Key Property Management LLC*, 2009 WY 84, 211 P.3d 503 (Wyo. 2009).
- 3 §§ 1066 to 1071.
- 4 Conn.—*Schumann v. Dianon Systems, Inc.*, 304 Conn. 585, 43 A.3d 111 (2012).
- 5 Conn.—*Schumann v. Dianon Systems, Inc.*, 304 Conn. 585, 43 A.3d 111 (2012).

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16B C.J.S. Constitutional Law § 1057

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

10. Labor Matters in Private Employment

§ 1057. First Amendment rights employers

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1905 to 1924

The First Amendment guaranty of free speech may be exercised by employers as well as employees with respect to labor matters but employer speech related to unions or union matters must be noncoercive and not threaten retaliation.

As a general rule, the right of free speech with respect to labor matters may be exercised by employers as well as employees.¹ An employer has the First Amendment right to engage in noncoercive speech about unions and unionism,² including the expression of antiunion views and objective, nonmisleading predictions of the likely effects of union representation.³ The employer's right of free speech in communicating views to employees cannot be infringed by a union or by the government.⁴ However, an employer's freedom of expression is protected only so long as it contains no threat of reprisal or force or promise of benefit in violation of the law.⁵ Any implication by the employer that, if employees join a union, the employer may close the plant solely on the employer's own initiative and unrelated to economic necessities is a threat of retaliation not protected by the First Amendment.⁶

An expression that would otherwise be protected may be regulated if necessary to protect the substantial rights of employees or to preserve harmonious labor-management relations in the public interest.⁷

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Footnotes

- 1 U.S.—*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).
- 2 U.S.—*Rhode Island Hospitality Ass'n v. City of Providence ex rel. Lombardi*, 667 F.3d 17 (1st Cir. 2011); *Chopmist Hill Fire Dept. v. Town of Scituate*, 780 F. Supp. 2d 179 (D.R.I. 2011).
- 3 U.S.—*N. L. R. B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969); *US Airways, Inc. v. National Mediation Bd.*, 177 F.3d 985 (D.C. Cir. 1999).
- 4 U.S.—*N. L. R. B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969).
- 5 U.S.—*N. L. R. B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969); *N.L.R.B. v. Riley-Beaird, Inc.*, 681 F.2d 1083 (5th Cir. 1982).
- 6 U.S.—*N. L. R. B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969).
Unprotected bylaw policy to close on unionization
U.S.—*Wiljef Transp., Inc. v. N.L.R.B.*, 946 F.2d 1308 (7th Cir. 1991).
- 7 U.S.—*International Union, United Auto., Aerospace and Agr. Implement Workers of America, and its Locals 1093, 558 and 25 v. National Right to Work Legal Defense and Ed. Foundation, Inc.*, 590 F.2d 1139, 26 Fed. R. Serv. 2d 582 (D.C. Cir. 1978).

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16B C.J.S. Constitutional Law § 1058

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

10. Labor Matters in Private Employment

§ 1058. First Amendment right to picket or demonstrate

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1917 to 1921

Peaceful picketing and demonstrations by labor is free speech protected under the First Amendment provided the purpose and manner of the picketing or demonstration is lawful; reasonable regulations may be imposed on the time, place, and manner of picketing or demonstrating.

Peaceful demonstrations,¹ the distribution of handbills or informational materials,² the display of banners,³ publicizing a strike,⁴ patrolling,⁵ or picketing by labor are free speech protected under the First Amendment,⁶ and the full protection of the First Amendment attaches to the strict speech content or the message of picketing in a labor dispute.⁷ Statutes or ordinances infringing on the right may be invalid.⁸ State statutes may afford greater protections to labor picketing than afforded other speech subjects without necessarily violating the First Amendment, given the state's interest in promoting collective bargaining to resolve labor disputes.⁹

There is no constitutional right to engage in picketing for an unlawful objective,¹⁰ for an unfair labor practice,¹¹ or to picket in an unlawful manner, as by the use of false or fraudulent statements,¹² nor to engage in picketing activity that is threatening,

intimidating, disruptive, or coercive.¹³ The State may not enjoin peaceful picketing merely because picketing may provoke violence in others.¹⁴

Picketing is subject to reasonable time, place, or manner restrictions as necessary to further significant governmental interests provided the regulations are without regard to the content of the message or speech¹⁵ and provided the regulations are narrowly drawn to achieve the legitimate government objective to be served.¹⁶ In public places, a constitutional forum analysis applies to determine the standard of scrutiny and justification required.¹⁷

Secondary picketing.

Picketing, although peaceful, which has as its objective the inducement or encouragement of secondary pressure, is not protected by the First Amendment right to free speech.¹⁸

Secondary boycotts.

Secondary boycotts may be restricted or prohibited without the violation of free speech.¹⁹

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Footnotes

- 1 U.S.—Sheet Metal Workers' Intern. Ass'n, Local 15, AFL-CIO v. N.L.R.B., 491 F.3d 429 (D.C. Cir. 2007).
- 2 U.S.—Fidelity Interior Const., Inc. v. Southeastern Carpenters Regional Council of United Broth. of Carpenters and Joiners of America, 675 F.3d 1250 (11th Cir. 2012); Sheet Metal Workers' Intern. Ass'n, Local 15, AFL-CIO v. N.L.R.B., 491 F.3d 429 (D.C. Cir. 2007).
Leafletting
- 3 U.S.—Hawkins v. City and County of Denver, 170 F.3d 1281 (10th Cir. 1999).
U.S.—Fidelity Interior Const., Inc. v. Southeastern Carpenters Regional Council of United Broth. of Carpenters and Joiners of America, 675 F.3d 1250 (11th Cir. 2012); Circle Group, L.L.C. v. Southeastern Carpenters Regional Council, 836 F. Supp. 2d 1327 (N.D. Ga. 2011).
- 4 U.S.—520 South Michigan Avenue Associates, Ltd. v. Unite Here Local 1, 760 F.3d 708 (7th Cir. 2014).
- 5 U.S.—Sheet Metal Workers' Intern. Ass'n, Local 15, AFL-CIO v. N.L.R.B., 491 F.3d 429 (D.C. Cir. 2007).
- 6 U.S.—Fidelity Interior Const., Inc. v. Southeastern Carpenters Regional Council of United Broth. of Carpenters and Joiners of America, 675 F.3d 1250 (11th Cir. 2012); United Food & Commercial Workers Local 99 v. Bennett, 934 F. Supp. 2d 1167 (D. Ariz. 2013).
Cal.—Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007).
- 7 U.S.—Local 391, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. City of Rocky Mount, 672 F.2d 376 (4th Cir. 1982).
- 8 U.S.—Service Employees Intern. Union, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010); United Food & Commercial Workers Local 99 v. Bennett, 934 F. Supp. 2d 1167 (D. Ariz. 2013).
Not content neutral restriction
- 9 Colo.—CF&I Steel, L.P. v. United Steel Workers of America, 23 P.3d 1197, 113 A.L.R.5th 631 (Colo. 2001).
Cal.—Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8, 55 Cal. 4th 1083, 150 Cal. Rptr. 3d 501, 290 P.3d 1116 (2012), cert. denied, 133 S. Ct. 2799, 186 L. Ed. 2d 860 (2013).
- 10 U.S.—Fidelity Interior Const., Inc. v. Southeastern Carpenters Regional Council of United Broth. of Carpenters and Joiners of America, 675 F.3d 1250 (11th Cir. 2012); United Food & Commercial Workers Local 99 v. Bennett, 934 F. Supp. 2d 1167 (D. Ariz. 2013).
- 11 U.S.—Fidelity Interior Const., Inc. v. Southeastern Carpenters Regional Council of United Broth. of Carpenters and Joiners of America, 675 F.3d 1250 (11th Cir. 2012).

- 12 U.S.—*San Antonio Community Hosp. v. Southern California Dist. Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997).
- 13 U.S.—*Circle Group, L.L.C. v. Southeastern Carpenters Regional Council*, 836 F. Supp. 2d 1327 (N.D. Ga. 2011).
- Coercive conduct not protected**
- U.S.—*520 South Michigan Avenue Associates, Ltd. v. Unite Here Local 1*, 760 F.3d 708 (7th Cir. 2014).
- Noncoercive mock funeral**
- U.S.—*Sheet Metal Workers' Intern. Ass'n, Local 15, AFL-CIO v. N.L.R.B.*, 491 F.3d 429 (D.C. Cir. 2007).
- 14 U.S.—*Cafeteria Employees Union, Local 302, v. Angelos*, 320 U.S. 293, 64 S. Ct. 126, 88 L. Ed. 58 (1943).
- 15 U.S.—*Service Employees Intern. Union, Local 5 v. City of Houston*, 595 F.3d 588 (5th Cir. 2010).
- Protests at funerals**
- U.S.—*Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013).
- No right on private property**
- Conn.—*United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate, L.P.*, 270 Conn. 261, 852 A.2d 659 (2004).
- 16 U.S.—*Service Employees Intern. Union, Local 5 v. City of Houston*, 595 F.3d 588 (5th Cir. 2010).
- Overbroad distance restrictions**
- U.S.—*United Food and Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988).
- 17 U.S.—*Tucker v. City of Fairfield, Ohio*, 398 F.3d 457, 2005 FED App. 0070P (6th Cir. 2005).
- Cal.—*Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, 55 Cal. 4th 1083, 150 Cal. Rptr. 3d 501, 290 P.3d 1116 (2012), cert. denied, 133 S. Ct. 2799, 186 L. Ed. 2d 860 (2013).
- 18 U.S.—*520 South Michigan Avenue Associates, Ltd. v. Unite Here Local 1*, 760 F.3d 708 (7th Cir. 2014); *Fidelity Interior Const., Inc. v. Southeastern Carpenters Regional Council of United Broth. of Carpenters and Joiners of America*, 675 F.3d 1250 (11th Cir. 2012).
- 19 U.S.—*N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982).

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16B C.J.S. Constitutional Law § 1059

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

a. Protection, Limitation, or Restriction of Speech

§ 1059. Overview of First Amendment rights of public officers and employees; effect of office or employment

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1925 to 1927

The freedom of speech guaranty of the First Amendment generally applies to public officers and employees and is not relinquished by a contract of public employment.

A citizen is not deprived of all fundamental rights by virtue of working for the government as the right to free speech under the First Amendment cannot be bargained away in a contract for public employment.¹ A government employee does not relinquish all First Amendment rights just by reason of employment by the government² and, within limits,³ is not subject to adverse employment actions, conditions, or retaliation for speaking out.⁴ The First Amendment guaranty of free speech applies to public employees' statements in the work place when they speak as citizens but not when they speak solely as public employees;⁵ protections apply when they speak regarding matters of public concern as may include statements related to the subject of the employment or job functions.⁶ First Amendment protections do not encompass statements made in the performance of job duties⁷ or purely personal statements.⁸ Mixed statements of a public and private nature may be afforded protection.⁹

The government may choose to give additional protections to employees beyond what is mandated by the First Amendment.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Public employees may not constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest. [U.S. Const. Amend. 1. Carey v. Throwe, 957 F.3d 468 \(4th Cir. 2020\).](#)

Public employees do not give up all First Amendment rights when they accept government employment, because the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen about matters of public concern. [U.S. Const. Amend. 1. Hagan v. Quinn, 867 F.3d 816 \(7th Cir. 2017\).](#)

Public employees do not surrender all their First Amendment rights by reason of their employment. [U.S. Const. Amend. 1. Singh v. Cordle, 936 F.3d 1022 \(10th Cir. 2019\).](#)

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Footnotes

- 1 [U.S.—Borough of Duryea, Pa. v. Guarnieri, 131 S. Ct. 2488, 180 L. Ed. 2d 408 \(2011\).](#)
- 2 [U.S.—Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\); City of San Diego, Cal. v. Roe, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 \(2004\); Werkheiser v. Pocono Tp., 780 F.3d 172 \(3d Cir. 2015\); Brooks v. Arthur, 685 F.3d 367 \(4th Cir. 2012\), cert. denied, 133 S. Ct. 983, 184 L. Ed. 2d 761 \(2013\).](#)
[Idaho—Sadid v. Idaho State University, 154 Idaho 88, 294 P.3d 1100, 289 Ed. Law Rep. 358 \(2013\).](#)
[Ind.—Love v. Rehfus, 946 N.E.2d 1 \(Ind. 2011\).](#)
[Tenn.—Parker v. Shelby County Government Civil Service Merit Bd., 392 S.W.3d 603 \(Tenn. Ct. App. 2012\), appeal denied, \(Jan. 9, 2013\).](#)
- 3 [§ 1060.](#)
- 4 [§ 1061.](#)
- 5 [U.S.—Borough of Duryea, Pa. v. Guarnieri, 131 S. Ct. 2488, 180 L. Ed. 2d 408 \(2011\); Foley v. Town of Randolph, 598 F.3d 1 \(1st Cir. 2010\); Fox v. Traverse City Area Public Schools Bd. of Educ., 605 F.3d 345, 257 Ed. Law Rep. 23 \(6th Cir. 2010\); Chrzanowski v. Bianchi, 725 F.3d 734 \(7th Cir. 2013\), cert. denied, 134 S. Ct. 2870, 189 L. Ed. 2d 832 \(2014\).](#)
- 6 [§§ 1066 to 1068.](#)
- 7 [§ 1069.](#)
- 8 [§ 1070.](#)
- 9 [§ 1071.](#)
- 10 [U.S.—Waters v. Churchill, 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 \(1994\).](#)

16B C.J.S. Constitutional Law § 1060

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

a. Protection, Limitation, or Restriction of Speech

§ 1060. Limitation or restriction of public employee's protected speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1925 to 1927

A public employee's right to free speech under the First Amendment is not absolute and is subject to limits greater than those permissible for the citizenry in general or the public at large.

A citizen who accepts public employment must accept certain limitations on certain fundamental rights, including limitations on free speech as protected under the First Amendment.¹ A public employee's right to free speech is not absolute and is subject to limits,² including conditions differing significantly from the freedom of speech possessed by the citizenry in general or the public at large.³ Restraints imposed by the government on the conduct and speech of public employees are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest in ensuring that all of its operations are efficient and effective, requiring broad government authority to supervise the conduct of public employees.⁴ The government may impose restraints on the job-related speech, meaning expressions made as part of the speaker's job duties.⁵ The First Amendment also allows restrictions on protected speech when the balance of employer and employee interests justifies the

restriction, as when the employer-employee relation might be compromised, or when the speech is disruptive to the employment relationship and employment duties.⁶

Rules or regulations impeding the speech of public employees violate the First Amendment if unconstitutionally vague or overbroad,⁷ but a court gives greater deference to government predictions of harm used to justify a restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.⁸

CUMULATIVE SUPPLEMENT

Cases:

The State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. [U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31](#), 138 S. Ct. 2448 (2018).

Fire department's application of its restrictions on use of its e-mail system, which was supposed to be used for departmental business only, to preclude firefighter from discussing otherwise permissible themes from a religious perspective was not a viewpoint-neutral application of its e-mail policy, as part of the *Pickering* balancing test used in the analysis to determine whether a public employee's speech was protected by the First Amendment; although e-mails sent over the system discussed fundraisers, social events, and selling tickets to sports events, the only time that department sought to enforce the policy was to preclude firefighter from sending e-mails about a religious fellowship, and firefighter's e-mails discussed topics addressed in employee-assistance-program newsletters. [U.S. Const. Amend. 1. Sprague v. Spokane Valley Fire Department](#), 409 P.3d 160 (Wash. 2018).

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Footnotes

- 1 [U.S.—Borough of Duryea, Pa. v. Guarnieri](#), 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011); [Werkheiser v. Pocono Tp.](#), 780 F.3d 172 (3d Cir. 2015).
[Ind.—Love v. Rehfus](#), 946 N.E.2d 1 (Ind. 2011).
[Tenn.—Parker v. Shelby County Government Civil Service Merit Bd.](#), 392 S.W.3d 603 (Tenn. Ct. App. 2012), appeal denied, (Jan. 9, 2013).
- 2 [U.S.—Borough of Duryea, Pa. v. Guarnieri](#), 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011); [Garcetti v. Ceballos](#), 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); [Hubbard v. Clayton County School Dist.](#), 756 F.3d 1264, 307 Ed. Law Rep. 27 (11th Cir. 2014); [LeFande v. District of Columbia](#), 613 F.3d 1155 (D.C. Cir. 2010).
[Ind.—Love v. Rehfus](#), 946 N.E.2d 1 (Ind. 2011).
[Md.—Newell v. Runnels](#), 407 Md. 578, 967 A.2d 729 (2009).
Substantially curtailed
[U.S.—Singer v. Ferro](#), 711 F.3d 334 (2d Cir. 2013).
- 3 [U.S.—U.S. v. National Treasury Employees Union](#), 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995); [Werkheiser v. Pocono Tp.](#), 780 F.3d 172 (3d Cir. 2015); [Bowie v. Maddox](#), 642 F.3d 1122 (D.C. Cir. 2011).
Greater restrictions by state as employer
[Idaho—Sadid v. Idaho State University](#), 154 Idaho 88, 294 P.3d 1100, 289 Ed. Law Rep. 358 (2013).
[N.Y.—Santer v. Board of Educ. of East Meadow Union Free School Dist.](#), 23 N.Y.3d 251, 990 N.Y.S.2d 442, 13 N.E.3d 1028, 307 Ed. Law Rep. 369 (2014).
[Tenn.—King v. Betts](#), 354 S.W.3d 691 (Tenn. 2011).

- 4 U.S.—*Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011); *Werkheiser v. Pocono*
Tp., 780 F.3d 172 (3d Cir. 2015).
- 5 § 1069.
- 6 § 1062.
- 7 U.S.—*Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981).
Alaska—*Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183 (Alaska 2007).
- 8 U.S.—*Andersen v. McCotter*, 205 F.3d 1214 (10th Cir. 2000).

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16B C.J.S. Constitutional Law § 1061

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

a. Protection, Limitation, or Restriction of Speech

§ 1061. Prohibited retaliation, adverse action, or condition for public employee exercise of First Amendment rights

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1928

The State may not retaliate against a public employee for exercising the First Amendment right to protected free speech or take other adverse employment actions or impose other conditions contrary to the employee's right.

The State may not retaliate against a public employee for exercising the First Amendment right to protected free speech,¹ including civil or criminal sanctions,² and may not make public employment subject to an express condition of political beliefs or prescribed expression, absent some reasonably appropriate requirement.³ Prohibited retaliation may include, among other things, discharging,⁴ disciplining, or penalizing the employee for the exercise of the right of freedom of speech.⁵

Retaliation for a public employee's exercise of free speech rights is actionable by the employee⁶ and does not require an adverse employment action within the meaning of the antidiscrimination statutes.⁷ The action requires proof that (1) the speech at issue was made as a citizen on matters of public concern rather than as an employee on matters of personal interest; (2) the

employee suffered an adverse employment action; and (3) the speech was at least a substantial or motivating factor in the adverse employment action.⁸

If an employee makes a prima facie showing of First Amendment retaliation, then a presumption of retaliation arises and the burden shifts to the defendant to advance a legitimate reason for the employment action.⁹ The employer may present evidence that the employee would have been terminated in the absence of protected conduct,¹⁰ but an employer's showing can be refuted by evidence that its ostensible explanation is merely pretextual.¹¹

Independent contractors.

The First Amendment protects independent contractors from termination or the denial of automatic renewal of at-will government contracts in retaliation for their exercise of freedom of speech.¹²

CUMULATIVE SUPPLEMENT

Cases:

Once a prisoner asserting a First Amendment retaliation claim establishes his protected speech or conduct was a substantial or motivating factor in the defendant prison official's decision to take adverse action against him, the official is tasked with explaining why her decision was not animated by retaliatory motives, in order to defeat the claim. [U.S. Const. Amend. 1. *Martin v. Duffy*, 977 F.3d 294 \(4th Cir. 2020\).](#)

Assistant state's attorney speech supporting candidate for position of state's attorney was not protected by First Amendment, and, thus, the newly-elected state's attorney's decision to terminate assistant state's attorney based on her vigorous campaign for opponent did not violate assistant state's attorney's free speech rights. [U.S. Const. Amend. 1. *Borzilleri v. Mosby*, 874 F.3d 187 \(4th Cir. 2017\).](#)

Public employers may not retaliate against employees based on their protected speech. [U.S. Const. Amend. 1. *Hudson v. City of Highland Park, Michigan*, 943 F.3d 792 \(6th Cir. 2019\).](#)

To determine whether a public employee's protected speech activity was substantial motivating factor in employer's decision to take adverse employment action, as would support causation element of prima facie case of First Amendment retaliation in § 1983 action, court must undertake three-part, burden-shifting inquiry; first, employee must show that he suffered adverse employment action that was causally connected to his participation in protected activity, and if employee so demonstrates, burden shifts to employer to show legitimate, nondiscriminatory reason for his or her actions, and if employer establishes such reason, burden shifts back to employee to show that employer's actions were pretext for illegal retaliation. [U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. *Henry v. Johnson*, 950 F.3d 1005 \(8th Cir. 2020\).](#)

County employee's reporting to supervisors and to human resources staff of her concern that her coworker was misusing federal grant funds by misreporting his work time was speech pursuant to employee's official duties, rather than as a private citizen, and thus, was not protected, as required to support employee's § 1983 First Amendment retaliation claim arising from her discharge; employee's reports were directed within her chain of command and were only made internally, and employee and her coworker were only individuals administering the federal grant at issue, so that reporting of coworker's suspected "wage theft" was type of activity that employee was paid to do. [U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. *Vercos v. Board of County Commissioners for County of El Paso*, 259 F. Supp. 3d 1169 \(D. Colo. 2017\).](#)

A public employee seeking to establish a case of retaliation for speech protected under the First Amendment must point to evidence sufficient to establish three elements: (1) the employee engaged in constitutionally protected speech; (2) the employee was subjected to adverse action or was deprived of some benefit; and (3) the protected speech was a substantial or motivating factor in the adverse action. [U.S.C.A. Const.Amend. 1](#); [42 U.S.C.A. § 1983](#). [Jamison v. Galena, 2015-Ohio-2845, 38 N.E.3d 1176](#) (Ohio Ct. App. 5th Dist. Delaware County 2015).

E-mails that firefighter sent on the department's e-mail system that discussed the mental health and well-being of firefighters, such as issues of suicide and stress relief, related to public safety and matters of public concern, as part of the analysis of whether the e-mails were speech by a public employee that was protected by the First Amendment, even though the e-mails had religious themes; firefighter's former boss had recently committed suicide, and department had paid for firefighter to take suicide-prevention courses. [U.S. Const. Amend. 1](#). [Sprague v. Spokane Valley Fire Department, 409 P.3d 160](#) (Wash. 2018).

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Footnotes

- 1 [U.S.—Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695, 164 L. Ed. 2d 441](#) (2006); [Rosaura Bldg. Corp. v. Municipality of Mayaguez, 778 F.3d 55, 90 Fed. R. Serv. 3d 1759](#) (1st Cir. 2015); [Garcia v. Hartford Police Dept., 706 F.3d 120](#) (2d Cir. 2013); [Wagner v. Campbell, 779 F.3d 761](#) (8th Cir. 2015).
[N.Y.—Santer v. Board of Educ. of East Meadow Union Free School Dist., 23 N.Y.3d 251, 990 N.Y.S.2d 442, 13 N.E.3d 1028, 307 Ed. Law Rep. 369](#) (2014).
[Tex.—Guillaume v. City of Greenville, 247 S.W.3d 457](#) (Tex. App. Dallas 2008).
A.L.R. Library
[First Amendment protection for law enforcement employees subjected to discharge, transfer, or discipline because of speech, 109 A.L.R. Fed. 9.](#)
[First Amendment protection for public hospital or health employees subjected to discharge, transfer, or discipline because of speech, 107 A.L.R. Fed. 21.](#)
[First Amendment protection for publicly employed firefighters subjected to discharge, transfer, or discipline because of speech, 106 A.L.R. Fed. 396.](#)
- 2 [U.S.—Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695, 164 L. Ed. 2d 441](#) (2006).
- 3 [U.S.—O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 116 S. Ct. 2353, 135 L. Ed. 2d 874](#) (1996).
Oaths prohibited when rights impinged
[U.S.—Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593](#) (1972).
Employment condition may not infringe rights
[S.D.—Gilbert v. Flandreau Santee Sioux Tribe, 2006 SD 109, 725 N.W.2d 249](#) (S.D. 2006).
[Utah—Doyle v. Lehi City, 2012 UT App 342, 291 P.3d 853](#) (Utah Ct. App. 2012).
- 4 [U.S.—Meyers v. Eastern Oklahoma County Technology Center, 776 F.3d 1201, 314 Ed. Law Rep. 43](#) (10th Cir. 2015); [Trant v. Oklahoma, 754 F.3d 1158](#) (10th Cir. 2014).
[La.—McGowan v. Housing Authority of New Orleans, 113 So. 3d 1143](#) (La. Ct. App. 4th Cir. 2013).
- 5 [U.S.—Fiesel v. Cherry, 294 F.3d 664](#) (5th Cir. 2002); [Gustafson v. Jones, 290 F.3d 895](#) (7th Cir. 2002).
Demotion
[U.S.—Wiggins v. Lowndes County, Miss., 363 F.3d 387](#) (5th Cir. 2004).
- 6 [U.S.—Rosaura Bldg. Corp. v. Municipality of Mayaguez, 778 F.3d 55, 90 Fed. R. Serv. 3d 1759](#) (1st Cir. 2015); [Rorrer v. City of Stow, 743 F.3d 1025](#) (6th Cir. 2014); [Meade v. Moraine Valley Community College, 770 F.3d 680, 310 Ed. Law Rep. 88](#) (7th Cir. 2014).
[N.J.—Winters v. North Hudson Regional Fire and Rescue, 212 N.J. 67, 50 A.3d 649](#) (2012).
[Tex.—Nairn v. Killeen Independent School Dist., 366 S.W.3d 229, 280 Ed. Law Rep. 1129](#) (Tex. App. El Paso 2012).

- 7 U.S.—*Hutchins v. Clarke*, 661 F.3d 947, 80 Fed. R. Serv. 3d 1404 (7th Cir. 2011); *Wagner v. Campbell*, 779 F.3d 761 (8th Cir. 2015).
- 8 U.S.—*Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Rosaura Bldg. Corp. v. Municipality of Mayaguez*, 778 F.3d 55, 90 Fed. R. Serv. 3d 1759 (1st Cir. 2015); *Dougherty v. School Dist. of Philadelphia*, 772 F.3d 979 (3d Cir. 2014); *Trant v. Oklahoma*, 754 F.3d 1158 (10th Cir. 2014).
N.J.—*Winters v. North Hudson Regional Fire and Rescue*, 212 N.J. 67, 50 A.3d 649 (2012).
Tex.—*Nairn v. Killeen Independent School Dist.*, 366 S.W.3d 229, 280 Ed. Law Rep. 1129 (Tex. App. El Paso 2012).
As to the balancing of interests and factors in determining a retaliation claim, see § 1062.
- 9 U.S.—*Craig v. Rich Tp. High School Dist.* 227, 736 F.3d 1110, 299 Ed. Law Rep. 377 (7th Cir. 2013), cert. denied, 134 S. Ct. 2300, 189 L. Ed. 2d 175 (2014); *Leslie v. Hancock County Bd. of Educ.*, 720 F.3d 1338, 295 Ed. Law Rep. 491 (11th Cir. 2013).
Ind.—*Love v. Rehfus*, 946 N.E.2d 1 (Ind. 2011).
N.J.—*Winters v. North Hudson Regional Fire and Rescue*, 212 N.J. 67, 50 A.3d 649 (2012).
Tex.—*Nairn v. Killeen Independent School Dist.*, 366 S.W.3d 229, 280 Ed. Law Rep. 1129 (Tex. App. El Paso 2012).
- 10 U.S.—*Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531 (6th Cir. 2012); *Clairmont v. Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011).
- 11 U.S.—*Cutler v. Stephen F. Austin State University*, 767 F.3d 462, 309 Ed. Law Rep. 123 (5th Cir. 2014).
Tex.—*Nairn v. Killeen Independent School Dist.*, 366 S.W.3d 229, 280 Ed. Law Rep. 1129 (Tex. App. El Paso 2012).
- 12 U.S.—*Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996).

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16B C.J.S. Constitutional Law § 1062

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

a. Protection, Limitation, or Restriction of Speech

§ 1062. Test for balance of interests for restriction of public employee First Amendment rights

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1931 to 1937

A public employee's statement on a matter of public concern is protected by the First Amendment guaranty of free speech, as citizen speech, and may be restricted only if the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees, outweighs the interests of the employee as a citizen in commenting on a matter of public concern.

A public employee's speech on a matter of public concern¹ is protected from adverse employment actions or conditions by the First Amendment guaranty of free speech,² and it may be restricted only if the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees, outweighs the interests of the employee, as a citizen, in commenting on matters of public concern.³ The discharge or termination of a government employee for protected speech may be justified when legitimate countervailing government interests are sufficiently strong.⁴ The balancing is necessary to accommodate the dual role of a public employer as a provider of public services and as a government entity operating under the

constraints of the First Amendment right to free speech.⁵ If a public employee's speech does not implicate a matter of public concern, the balancing test is not reached.⁶

The statement of the balancing test for First Amendment retaliation cases rests on a foundational United States Supreme Court decision,⁷ but its wording varies somewhat in decisions by the federal courts of appeal; it is generally refined into a five-step inquiry into whether: (1) the plaintiff spoke on matter of public concern, (2) the plaintiff spoke as private citizen or public employee, (3) the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action, (4) the State had an adequate justification for treating the employee differently from other members of the general public, and (5) the State would have taken the adverse employment action even absent the protected speech.⁸ Alternatively stated, the test inquires into the following: (1) whether the speech was made pursuant to an employee's official duties, (2) whether the speech was on a matter of public concern, (3) whether the government's interests, as an employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests, (4) whether the protected speech was a motivating factor in the adverse employment action, and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.⁹

Additional factors for consideration include: (1) whether the speech would create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform job responsibilities; (4) the time, place, and manner of the speech; (5) the context within which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.¹⁰

The less serious, portentous, political, or significant the genre of a public employee's expression, the less imposing the justification that the public employer must put forth in order to be permitted to suppress the expression, without violating the First Amendment.¹¹

Disruption or interference.

In conducting the balancing of interests, the often determinative question is whether the speech interferes with the employee's work or with the efficient and successful operation of the office.¹² Restrictions are allowed when the employer-employee relation might be compromised or when the speech is disruptive to the employment relationship and employment duties.¹³ Actual disruption is not required¹⁴ but mere speculative concerns are inadequate.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

When a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected by the First Amendment unless the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees outweighs the interests of the employee, as a citizen, in commenting upon matters of public concern. [U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 \(2018\).](#)

The balancing a court must undertake under the *Pickering* test, which weighs a public employee's interest in commenting upon matters of public concern against the government's interest as an employer in promoting efficiency and avoiding workplace disruption, is a fact-intensive inquiry that requires consideration of the entire record, and must yield different results depending on the relative strengths of the issue of public concern and the employer's interest; in short, the inquiry involves a sliding scale,

in which the amount of disruption a public employer has to tolerate is directly proportional to the importance of the disputed speech to the public. [U.S.C.A. Const.Amend. 1. *Munroe v. Central Bucks School Dist.*, 805 F.3d 454 \(3d Cir. 2015\).](#)

County fire department employer's interest in workplace efficiency and preventing disruption outweighed free speech interests of a county fire department employee, who was a battalion chief, in posting comments on his social media webpage criticizing "liberal gun" control policies and the department's social media policy, and making references that were arguably racially charged and threatening violence, and thus, employee's discharge because of comments did not violate his First Amendment rights; employee's social media activity interfered with department operations and discipline, it affected working relationships within department, it significantly conflicted with employee's responsibilities as battalion chief to enforce department policies, and the posts threatened community trust in the department. [U.S. Const. Amend. 1. *Grutzmacher v. Howard County*, 851 F.3d 332 \(4th Cir. 2017\).](#)

In evaluating public employee's First Amendment retaliation claim, if employee's speech is made outside workplace, involves content largely unrelated to her government employment, and is addressed to public audience or involves any matter for which there is potentially public, court must engage in *Pickering* balancing between employee's interests, as citizen, in commenting upon matters of public concern and state's interest, as employer, in promoting efficiency of public services it performs through its employees. [U.S. Const. Amend. 1. *Harnishfeger v. United States*, 943 F.3d 1105 \(7th Cir. 2019\).](#)

Pickering factors for analyzing a public employee's First Amendment retaliation claim include: (1) the need for harmony in the office or work place, (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate, (3) the time, manner, and place of the speech, (4) the context in which the dispute arose, (5) the degree of public interest in the speech, and (6) whether the speech impeded the employee's ability to perform his or her duties. [U.S. Const. Amend. 1. *Henry v. Johnson*, 950 F.3d 1005 \(8th Cir. 2020\).](#)

While a citizen who enters public service must accept certain limitations on her freedoms, she does not relinquish the First Amendment rights she would otherwise enjoy as a citizen to comment on matters of public interest; thus, the aim is to strike a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. [U.S.C.A. Const.Amend. 1. *Alves v. Board of Regents of the University System of Georgia*, 804 F.3d 1149 \(11th Cir. 2015\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 §§ 1066 to 1068.
- 2 § 1061.
- 3 U.S.—*Harris v. Quinn*, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014); *Lane v. Franks*, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014); *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011); *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Dougherty v. School Dist. of Philadelphia*, 772 F.3d 979 (3d Cir. 2014); *Smith v. Gilchrist*, 749 F.3d 302 (4th Cir. 2014).
Ind.—*Messer v. New Albany Police Dept.*, 965 N.E.2d 54 (Ind. Ct. App. 2012).
Ky.—*Mendez v. University of Kentucky Bd. of Trustees*, 357 S.W.3d 534, 276 Ed. Law Rep. 1072 (Ky. Ct. App. 2011).
N.Y.—*Santer v. Board of Educ. of East Meadow Union Free School Dist.*, 23 N.Y.3d 251, 990 N.Y.S.2d 442, 13 N.E.3d 1028, 307 Ed. Law Rep. 369 (2014).
- 4 U.S.—*Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996).

- 5 U.S.—*Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987).
- 6 U.S.—*Hernandez v. Cook County Sheriff's Office*, 634 F.3d 906 (7th Cir. 2011).
- 7 U.S.—*Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).
- 8 U.S.—*Hagen v. City of Eugene*, 736 F.3d 1251 (9th Cir. 2013); *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013), cert. denied, 134 S. Ct. 1283, 188 L. Ed. 2d 300 (2014).
- 9 U.S.—*Fields v. City of Tulsa*, 753 F.3d 1000 (10th Cir. 2014), cert. denied, 135 S. Ct. 714, 190 L. Ed. 2d 440 (2014); *Morris v. City of Colorado Springs*, 666 F.3d 654 (10th Cir. 2012).
- 10 U.S.—*Volkman v. Ryker*, 736 F.3d 1084, 87 Fed. R. Serv. 3d 365 (7th Cir. 2013).
Ind.—*Messer v. New Albany Police Dept.*, 965 N.E.2d 54 (Ind. Ct. App. 2012).
Varying factors considered
U.S.—*Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013); *Hemminghaus v. Missouri*, 756 F.3d 1100 (8th Cir. 2014).
Md.—*Newell v. Runnels*, 407 Md. 578, 967 A.2d 729 (2009).
- 11 U.S.—*Craig v. Rich Tp. High School Dist. 227*, 736 F.3d 1110, 299 Ed. Law Rep. 377 (7th Cir. 2013), cert. denied, 134 S. Ct. 2300, 189 L. Ed. 2d 175 (2014).
N.Y.—*Santer v. Board of Educ. of East Meadow Union Free School Dist.*, 23 N.Y.3d 251, 990 N.Y.S.2d 442, 13 N.E.3d 1028, 307 Ed. Law Rep. 369 (2014).
- 12 U.S.—*Volkman v. Ryker*, 736 F.3d 1084, 87 Fed. R. Serv. 3d 365 (7th Cir. 2013); *Hemminghaus v. Missouri*, 756 F.3d 1100 (8th Cir. 2014).
- 13 U.S.—*Fields v. City of Tulsa*, 753 F.3d 1000 (10th Cir. 2014), cert. denied, 135 S. Ct. 714, 190 L. Ed. 2d 440 (2014).
Idaho—*Sadid v. Idaho State University*, 154 Idaho 88, 294 P.3d 1100, 289 Ed. Law Rep. 358 (2013).
N.Y.—*Santer v. Board of Educ. of East Meadow Union Free School Dist.*, 23 N.Y.3d 251, 990 N.Y.S.2d 442, 13 N.E.3d 1028, 307 Ed. Law Rep. 369 (2014).
- 14 U.S.—*Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013); *Trant v. Oklahoma*, 754 F.3d 1158 (10th Cir. 2014).
Ind.—*Messer v. New Albany Police Dept.*, 965 N.E.2d 54 (Ind. Ct. App. 2012).
- 15 U.S.—*Whitney v. City of Milan*, 677 F.3d 292 (6th Cir. 2012).
Ind.—*Messer v. New Albany Police Dept.*, 965 N.E.2d 54 (Ind. Ct. App. 2012).

16B C.J.S. Constitutional Law § 1063

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

b. Standards for Particular Types of Officials, Officers, or Employees

§ 1063. First Amendment rights of public or government entity

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1925 to 1927

The First Amendment guaranty of free speech does not restrict or limit the speech of a governmental entity.

Under the First Amendment's guaranty of free speech, a government entity has the right to speak for itself and is entitled to say what it wishes and to select the views that it wants to express.¹ The government's own speech is exempt from First Amendment scrutiny² and is not restrained by the First Amendment.³ The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.⁴

CUMULATIVE SUPPLEMENT

Cases:

The First Amendment, which prohibits Congress and other government entities and actors from abridging the freedom of speech, does not say that Congress and other government entities must abridge their own ability to speak freely. [U.S.C.A. Const.Amend. 1. *Matal v. Tam*, 137 S. Ct. 1744 \(2017\).](#)

While the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others, imposing a requirement of viewpoint-neutrality on government speech would be paralyzing; when a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others, and the Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture. [U.S.C.A. Const.Amend. 1. *Matal v. Tam*, 137 S. Ct. 1744 \(2017\).](#)

While the government-speech doctrine is important, and indeed, essential, it is a doctrine that is susceptible to dangerous misuse, and if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints; for that reason, the Supreme Court must exercise great caution before extending its government-speech precedents. [U.S.C.A. Const.Amend. 1. *Matal v. Tam*, 137 S. Ct. 1744 \(2017\).](#)

Government entity is entitled to say what it wants to say, but only within limits; it is not permitted to employ threats to squelch free speech of private citizens. [U.S.C.A. Const.Amend. 1. *Backpage.com, LLC v. Dart*, 807 F.3d 229 \(7th Cir. 2015\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—*Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 \(2009\); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 142 Ed. Law Rep. 624 \(2000\); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 \(1995\).](#)
- 2 [U.S.—*Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896 \(2005\).](#)
- 3 [U.S.—*Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 93 S. Ct. 2080, 36 L. Ed. 2d 772 \(1973\) \(Stewart, J., concurring\).](#)
- 4 [U.S.—*Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 \(2009\).](#)

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16B C.J.S. Constitutional Law § 1064

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

b. Standards for Particular Types of Officials, Officers, or Employees

§ 1064. First Amendment rights of legislators

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1925 to 1927

Limitations on the First Amendment guaranty of free speech may apply to the official duties of legislators.

The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy,¹ and there is no First Amendment right to prevent legislators from expressing their own views so long as they do so without engaging in any threat or coercion.² A state may not apply a stricter standard of speech to legislators, restricting the right of legislators to a greater extent than private citizens.³ However, a legislator casts a vote as a trustee for constituents, not as a prerogative of personal power, and thus, restrictions on legislators' voting are not restrictions on their First Amendment free speech rights; a legislator has no right to use official powers for expressive purposes.⁴ A legislative body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political, or ideological reasons.⁵

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Footnotes

- 1 U.S.—[Bond v. Floyd](#), 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966); [DeGrassi v. City of Glendora](#), 207 F.3d 636 (9th Cir. 2000).
Cal.—[Levy v. City of Santa Monica](#), 114 Cal. App. 4th 1252, 8 Cal. Rptr. 3d 507 (2d Dist. 2004).
- 2 U.S.—[Hinshaw v. Smith](#), 436 F.3d 997 (8th Cir. 2006).
No loss of right on becoming legislator
U.S.—[X-Men Sec., Inc. v. Pataki](#), 196 F.3d 56 (2d Cir. 1999).
- 3 U.S.—[Bond v. Floyd](#), 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).
Alaska—[Alsworth v. Seybert](#), 323 P.3d 47 (Alaska 2014).
- 4 U.S.—[Nevada Com'n on Ethics v. Carrigan](#), 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011).
- 5 U.S.—[Zilich v. Longo](#), 34 F.3d 359, 1994 FED App. 0307P (6th Cir. 1994).

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16B C.J.S. Constitutional Law § 1065

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

b. Standards for Particular Types of Officials, Officers, or Employees

§ 1065. First Amendment rights of employees as policymakers

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1938

The First Amendment guaranty of free speech does not preclude adverse employment actions or speech restrictions against government policymaking employees based on their speech.

A public employee who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence enjoys substantially less First Amendment protection from adverse employment actions than does a lower level employee.¹ The exception rests on the higher likelihood that the employee's speech will cause disruption to the agency's successful functioning.² A presumption arises in this context that the weight of competing interests between the employee and the government rests with the government's interest in efficient public service by policy makers.³ Thus, the burden of caution public employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employees' role entails.⁴

The principle of the policymaker exception may be viewed as merging with considerations governing the discharge of public employees because of their political beliefs and affiliations as to which a narrow exception is allowed for patronage dismissals of public employees occupying policymaking positions.⁵

The policymaking employee exception to the principle that dismissals of public employees based on their speech violates the First Amendment does not immunize public employer action unconnected to and unmotivated by a need for political loyalty.⁶ The exception does not cover all employee speech, and speech unrelated to job duties or a political viewpoint runs too remote from the interests that animate the exception to be covered.⁷

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Footnotes

- 1 U.S.—[Bland v. Roberts](#), 730 F.3d 368 (4th Cir. 2013), as amended (Sept. 23, 2013); [Fields v. City of Tulsa](#), 753 F.3d 1000 (10th Cir. 2014), cert. denied, 135 S. Ct. 714, 190 L. Ed. 2d 440 (2014).
Wash.—[Benjamin v. Washington State Bar Ass'n](#), 138 Wash. 2d 506, 980 P.2d 742 (1999).
Policymakers must be on same page
U.S.—[Foote v. Town of Bedford](#), 642 F.3d 80 (1st Cir. 2011).
Political loyalty is essential
U.S.—[Galli v. New Jersey Meadowlands Comm'n](#), 490 F.3d 265 (3d Cir. 2007).
Policymaker or confidential employee defined
U.S.—[Wiggins v. Lowndes County, Miss.](#), 363 F.3d 387 (5th Cir. 2004).
- 2 U.S.—[Silberstein v. City of Dayton](#), 440 F.3d 306, 2006 FED App. 0083P (6th Cir. 2006); [Fields v. City of Tulsa](#), 753 F.3d 1000 (10th Cir. 2014), cert. denied, 135 S. Ct. 714, 190 L. Ed. 2d 440 (2014).
- 3 U.S.—[Silberstein v. City of Dayton](#), 440 F.3d 306, 2006 FED App. 0083P (6th Cir. 2006).
As to the balancing of government and employee interests, generally, see § 1062.
Weights heavily in government's favor
U.S.—[Hinshaw v. Smith](#), 436 F.3d 997 (8th Cir. 2006).
- 4 U.S.—[Fields v. City of Tulsa](#), 753 F.3d 1000 (10th Cir. 2014), cert. denied, 135 S. Ct. 714, 190 L. Ed. 2d 440 (2014).
- 5 U.S.—[Bland v. Roberts](#), 730 F.3d 368 (4th Cir. 2013), as amended (Sept. 23, 2013).
- 6 U.S.—[Bonds v. Milwaukee County](#), 207 F.3d 969 (7th Cir. 2000).
- 7 U.S.—[Bonds v. Milwaukee County](#), 207 F.3d 969 (7th Cir. 2000).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

c. Standards for Particular Types of Speech

(1) Speech on Matter of Public Concern

§ 1066. Protection afforded public concern speech by public employee

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1925 to 1929

The First Amendment protects government employees from retaliation or adverse employment actions or conditions when they speak on matters of public concern.

The First Amendment guaranty of free speech, affording protection from adverse employment actions, applies to public employees' statements in the work place regarding matters of public concern¹ as may include statements involving the subject matter of the employment,² concerning employment duties,³ or related to the employees' job functions⁴ provided the statements are not actually job responsibilities or duties.⁵ The public concern test necessarily requires a finding that the employee did not speak pursuant to official duties as a public employee,⁶ and the test functions to prevent every employee's grievance from becoming a constitutional case while protecting a public employee's right as a citizen to speak on issues of concern to the community.⁷

The employee's speech need not actually be made public in order to constitute speech on a matter of public concern,⁸ and the employee's First Amendment rights are not lost simply because the communication is done privately with the employer and not spread before the public.⁹

CUMULATIVE SUPPLEMENT

Cases:

Public employee speech is largely unprotected by the First Amendment if it is part of what the employee is paid to do, or if it involved a matter of only private concern. U.S.C.A. Const.Amend. 1. *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Lane v. Franks*, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014); *Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012); *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011); *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Smith v. County of Suffolk*, 776 F.3d 114 (2d Cir. 2015); *Graziosi v. City of Greenville Miss.*, 775 F.3d 731 (5th Cir. 2015).
Ind.—*Messer v. New Albany Police Dept.*, 965 N.E.2d 54 (Ind. Ct. App. 2012).
N.J.—*In re Disciplinary Action Against Gonzalez*, 405 N.J. Super. 336, 964 A.2d 811 (App. Div. 2009).
N.C.—*Feltman v. City of Wilson*, 767 S.E.2d 615 (N.C. Ct. App. 2014).
Or.—*Huber v. Oregon Dept. of Educ.*, 235 Or. App. 230, 230 P.3d 937 (2010).
Pa.—*Todora v. Buskirk*, 96 A.3d 414 (Pa. Commw. Ct. 2014).
Tenn.—*King v. Betts*, 354 S.W.3d 691 (Tenn. 2011).
- 2 U.S.—*Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Dougherty v. School Dist. of Philadelphia*, 772 F.3d 979 (3d Cir. 2014); *Chrzanowski v. Bianchi*, 725 F.3d 734 (7th Cir. 2013), cert. denied, 134 S. Ct. 2870, 189 L. Ed. 2d 832 (2014); *Hagen v. City of Eugene*, 736 F.3d 1251 (9th Cir. 2013).
- 3 U.S.—*Lane v. Franks*, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014).
- 4 U.S.—*Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Kozisek v. County of Seward, Nebraska*, 539 F.3d 930 (8th Cir. 2008); *Dahlia v. Rodriguez*, 689 F.3d 1094 (9th Cir. 2012), on reh'g en banc, 735 F.3d 1060 (9th Cir. 2013), cert. denied, 134 S. Ct. 1283, 188 L. Ed. 2d 300 (2014).
- 5 § 1069.
- 6 Md.—*Newell v. Runnels*, 407 Md. 578, 967 A.2d 729 (2009).
- 7 Neb.—*Brock v. Dunning*, 288 Neb. 909, 854 N.W.2d 275 (2014).
Purpose of test
La.—*McGowan v. Housing Authority of New Orleans*, 113 So. 3d 1143 (La. Ct. App. 4th Cir. 2013).
- 8 U.S.—*Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999).
- 9 U.S.—*Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Peterson v. Atlanta Housing Authority*, 998 F.2d 904, 26 Fed. R. Serv. 3d 1040 (11th Cir. 1993).

16B C.J.S. Constitutional Law § 1067

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

c. Standards for Particular Types of Speech

(1) Speech on Matter of Public Concern

§ 1067. Matters of public interest as protected public employee speech; government policies, funds, services, and facilities

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1925 to 1929

A matter of public concern, as protected public employee speech within the First Amendment, is typically a matter concerning government policies that are of interest to the public at large, legitimate news interest, or something of political, social, or other concern to the community.

A public employee's speech on matters of public concern, as protected public employee speech within the First Amendment in regard to adverse employment actions,¹ is speech typically concerning government policies that are of interest to the public at large² or generally of public interest,³ meaning something of political, social, or other concern to the community,⁴ or something that is the subject of legitimate news interest or is a subject of general interest and of value to the public at the time.⁵ Public concerns are characterized as those matters as to which free and open debate is vital to an informed decision-making electorate.⁶

Matters considered within the ambit of public interest or concern for this purpose, except to the extent that the statements are delivered in the performance of public employment duties or responsibilities,⁷ include discrimination,⁸ sexual harassment,⁹ public misconduct or corruption,¹⁰ impropriety or other malfeasance, wrongdoing or breach of public trust,¹¹ the use of public funds,¹² government waste,¹³ the use or availability of public facilities,¹⁴ the availability of public services,¹⁵ the efficiency of public services,¹⁶ the performance of government agencies,¹⁷ public taxation,¹⁸ a candidacy for public office,¹⁹ or public health and safety.²⁰

Matters of public concern do not generally include a government employee's statement concerning individual personnel disputes,²¹ employment disputes,²² employment conditions,²³ or an internal grievance.²⁴

CUMULATIVE SUPPLEMENT

Cases:

Rule that public employees who make statements pursuant to their official duties are not speaking as public citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline, is balanced with court's acknowledgement that if employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. [U.S. Const. Amend. 1. *Javitz v. County of Luzerne*, 940 F.3d 858 \(3d Cir. 2019\).](#)

A public employee's speech warrants First Amendment protection when it seeks to bring to light actual or potential wrongdoing or breach of public trust. [U.S. Const. Amend. 1. *Greisen v. Hanken*, 925 F.3d 1097 \(9th Cir. 2019\).](#)

To determine the constitutionality of the state's restrictions on its employees' right to speak, courts must decide whether the speech at issue addresses a matter of public concern and if so, decide the proper balance between the employee's constitutional rights and the state's interest as an employer in promoting efficient provision of public services. [U.S.C.A. Const. Amend. 1. *Kane v. City of Albuquerque*, 2015-NMSC-027, 358 P.3d 249 \(N.M. 2015\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [§ 1066.](#)
- 2 [U.S.—*City of San Diego, Cal. v. Roe*, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 \(2004\).](#)
- 3 [U.S.—*Craig v. Rich Tp. High School Dist.* 227, 736 F.3d 1110, 299 Ed. Law Rep. 377 \(7th Cir. 2013\), cert. denied, 134 S. Ct. 2300, 189 L. Ed. 2d 175 \(2014\).](#)
- 4 [U.S.—*Lane v. Franks*, 134 S. Ct. 2369, 189 L. Ed. 2d 312 \(2014\); *Graziosi v. City of Greenville Miss.*, 775 F.3d 731 \(5th Cir. 2015\).](#)
[Neb.—*Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 \(2014\).](#)
[N.Y.—*Santer v. Board of Educ. of East Meadow Union Free School Dist.*, 23 N.Y.3d 251, 990 N.Y.S.2d 442, 13 N.E.3d 1028, 307 Ed. Law Rep. 369 \(2014\).](#)
[Pa.—*Todora v. Buskirk*, 96 A.3d 414 \(Pa. Commw. Ct. 2014\).](#)
- 5 [U.S.—*Lane v. Franks*, 134 S. Ct. 2369, 189 L. Ed. 2d 312 \(2014\); *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 \(2004\).](#)
[La.—*McGowan v. Housing Authority of New Orleans*, 113 So. 3d 1143 \(La. Ct. App. 4th Cir. 2013\).](#)

- 6 Tenn.—Phillips v. State Bd. of Regents of State University and Community College System of State of
Tenn., 863 S.W.2d 45, 86 Ed. Law Rep. 1085 (Tenn. 1993).
- 7 § 1069.
- 8 U.S.—Turner v. City of Beaumont, 835 F. Supp. 916 (E.D. Tex. 1993).
- Neb.—Cox v. Civil Service Com'n of Douglas County, 259 Neb. 1013, 614 N.W.2d 273 (2000).
- 9 U.S.—Eisenhour v. Weber County, 744 F.3d 1220 (10th Cir. 2014).
- 10 U.S.—Dougherty v. School Dist. of Philadelphia, 772 F.3d 979 (3d Cir. 2014); Eisenhour v. Weber County,
744 F.3d 1220 (10th Cir. 2014).
- Russo v. City of Hartford, 419 F. Supp. 2d 134 (D. Conn. 2006).
- S.C.—Town of Duncan v. State Budget and Control Bd., Div. of Ins. Services, 326 S.C. 6, 482 S.E.2d 768
(1997).
- 11 U.S.—Eisenhour v. Weber County, 744 F.3d 1220 (10th Cir. 2014).
- 12 U.S.—Schrier v. University Of Co., 427 F.3d 1253, 203 Ed. Law Rep. 59 (10th Cir. 2005).
- 13 U.S.—Chaklos v. Stevens, 560 F.3d 705 (7th Cir. 2009).
- 14 U.S.—Schrier v. University Of Co., 427 F.3d 1253, 203 Ed. Law Rep. 59 (10th Cir. 2005).
- 15 U.S.—Demers v. Austin, 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014).
- Neb.—Carney v. Miller, 287 Neb. 400, 842 N.W.2d 782 (2014).
- 16 U.S.—Moore v. Darlington Twp., 690 F. Supp. 2d 378 (W.D. Pa. 2010).
- 17 U.S.—Clairmont v. Sound Mental Health, 632 F.3d 1091 (9th Cir. 2011).
- 18 N.H.—Snelling v. City of Claremont, 155 N.H. 674, 931 A.2d 1272 (2007).
- 19 N.J.—G.D. v. Kenny, 205 N.J. 275, 15 A.3d 300 (2011).
- 20 N.J.—In re Disciplinary Action Against Gonzalez, 405 N.J. Super. 336, 964 A.2d 811 (App. Div. 2009).
- Tenn.—King v. Betts, 354 S.W.3d 691 (Tenn. 2011).
- Abortion or choice alternatives**
- U.S.—Carey v. Maricopa County, 602 F. Supp. 2d 1132 (D. Ariz. 2009).
- 21 U.S.—Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2013).
- Wash.—Harrell v. Washington State ex rel. Dept. of Social Health Services, 170 Wash. App. 386, 285 P.3d
159 (Div. 2 2012), review granted, 176 Wash. 2d 1011, 297 P.3d 706 (2013) and review dismissed, (Apr.
23, 2013).
- 22 U.S.—Eisenhour v. Weber County, 744 F.3d 1220 (10th Cir. 2014).
- 23 U.S.—Singh v. City of New York, 524 F.3d 361 (2d Cir. 2008); Durham v. Jones, 737 F.3d 291 (4th Cir.
2013).
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2013); Morris v. City of Colorado Springs, 666 F.3d 654 (10th Cir. 2012).
- Mont.—Ray v. Montana Tech of University of Montana, 2007 MT 21, 335 Mont. 367, 152 P.3d 122, 216
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- Excluding personal employment grievance**
- U.S.—Olendzki v. Rossi, 765 F.3d 742 (7th Cir. 2014); Leverington v. City of Colorado Springs, 643 F.3d
719 (10th Cir. 2011).
- Neb.—Clairmont v. Sound Mental Health, 632 F.3d 1091 (9th Cir. 2011).
- Excluding mere private grievance**
- Ala.—Alabama State Personnel Bd. v. Hancock, 151 So. 3d 1092 (Ala. Civ. App. 2013).
- Tenn.—King v. Betts, 354 S.W.3d 691 (Tenn. 2011).

16B C.J.S. Constitutional Law § 1068

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

c. Standards for Particular Types of Speech

(1) Speech on Matter of Public Concern

§ 1068. Factors and context for determining matter of public concern protecting public employee's speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1925 to 1929

Determining whether the subject of a public employee's speech is a matter of public concern, warranting protection under the First Amendment, requires examining the content, form, and context of a given statement.

Determining whether the subject of a public employee's speech is a matter of public concern, warranting protection under the First Amendment from adverse employment actions,¹ requires examining the content, form, and context of a given statement² as revealed by the whole record.³ The employee's statement may not be divorced from the context in which it is made as byrequiring the employee to repeat the statement in order to use that statement standing alone as the basis for discharge.⁴

The following nonexclusive list of contextual factors are instructive: whether the employee was commissioned or paid to make the speech in question, the subject matter of the speech, whether the speech was made up the chain of command, whether the

employee spoke at the place of employment, whether the speech gave objective observers the impression that the employee represented the employer when speaking, whether the employee's speech derived from special knowledge obtained during the course of the employment, and whether there is a so-called citizen analogue to the speech.⁵ If an employee expresses a grievance to a limited audience, the circulation can suggest a lack of public concern, but limited circulation is not, in itself, determinative.⁶ No one factor is dispositive.⁷

The court must determine the overall objective or point of the speech⁸ and not what might be incidentally conveyed by the speech.⁹ The public employee's motivation is a relevant, but not dispositive, factor,¹⁰ and should not be given undue weight,¹¹ since the pertinent question is not why the employee spoke but what the employee said; the court is concerned with the distinction between matters of public concern and those of only private interest, not between civic-minded motives and self-serving motives.¹² A personal motivation does not destroy the character of a communication as one of public concern but is certainly a factor for consideration,¹³ but speech is not of public concern if a matter of public interest is addressed only as to its personal effect on the employee¹⁴ or the overall point is personal.¹⁵

The correctness,¹⁶ propriety, relevance, controversial character,¹⁷ or offensiveness of the statements are irrelevant to whether a speech is on a matter of public concern¹⁸ provided the statements are not false and deliberately or recklessly made.¹⁹

CUMULATIVE SUPPLEMENT

Cases:

In considering the content, form, and context of speech in order to determine whether speech is of public or private concern, for purposes of the public concern test for speech that is entitled to special protection under the First Amendment, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said. [U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 \(2011\).](#)

To determine whether commentary is of a public concern, and therefore shielded from liability under the First Amendment, a court looks to decisions as guideposts, assessing how the content, form, and context of the speech compares to the speech at issue in other cases as revealed by the whole record. [U.S. Const. Amend. 1. Higgins v. Kentucky Sports Radio, LLC, 951 F.3d 728 \(6th Cir. 2020\).](#)

Where a wholesale deterrent to a broad category of expression, rather than a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities, is at issue, a court weighs the impact of the ban as a whole under the First Amendment, both on the employees whose speech may be curtailed and on the public interested in what they might say, against the restricted speech's necessary impact on the actual operation of the government. [U.S. Const. Amend. 1. Moonin v. Tice, 868 F.3d 853 \(9th Cir. 2017\).](#)

Police officers did not engage in speech as citizens on matters of public concern in writing letters to mayor and board of aldermen and in providing hearing testimony criticizing acting chief of police, and therefore, speech was not protected by the First Amendment; letters offered concerns about chief's ability to supervise and manage personnel, officers' letters requested chief be relieved of supervisory role over them, letters stated they were to be considered official, and testimony also only involved personnel issues relevant only to internal operation of police department. [U.S. Const. Amend. 1. Barnes v. City of Charlack, Missouri, 183 F. Supp. 3d 956 \(E.D. Mo. 2016\).](#)

First Amendment rights of county hospital employee were not violated when a supervisor allegedly prevented the employee from speaking to officials from the New York State Department of Health (NYSDOH) investigating employee's alleged mistreatment

of a patient, since employee's intended speech did not touch on a matter of public concern; employee was primarily concerned with correcting the public record with regard to his job performance, safeguarding or restoring his good professional reputation, and pointedly responding to factual findings in a single, specific agency investigation, all with respect to his treatment of one particular patient, and there was no indication that the employee intended to correct or call the public's attention to any larger, systemic issue concerning public health, patient care, or the conduct of investigations in general. [U.S.C.A. Const.Amend. 1. Spring v. County of Monroe, N.Y., 103 F. Supp. 3d 361 \(W.D. N.Y. 2015\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [§ 1066.](#)
- 2 [U.S.—Lane v. Franks, 134 S. Ct. 2369, 189 L. Ed. 2d 312 \(2014\); Meade v. Moraine Valley Community College, 770 F.3d 680, 310 Ed. Law Rep. 88 \(7th Cir. 2014\).](#)
[Ala.—Alabama State Personnel Bd. v. Hancock, 151 So. 3d 1092 \(Ala. Civ. App. 2013\).](#)
[Neb.—Brock v. Dunning, 288 Neb. 909, 854 N.W.2d 275 \(2014\).](#)
[Pa.—Todora v. Buskirk, 96 A.3d 414 \(Pa. Commw. Ct. 2014\).](#)
Same standard as invasion of privacy action
[U.S.—City of San Diego, Cal. v. Roe, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 \(2004\).](#)
Time, manner, and place are relevant
[U.S.—Starling v. Board Of County Com'rs, 602 F.3d 1257 \(11th Cir. 2010\).](#)
- 3 [U.S.—City of San Diego, Cal. v. Roe, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 \(2004\); Graber v. Clarke, 763 F.3d 888 \(7th Cir. 2014\).](#)
[Wash.—Harrell v. Washington State ex rel. Dept. of Social Health Services, 170 Wash. App. 386, 285 P.3d 159 \(Div. 2 2012\), review granted, 176 Wash. 2d 1011, 297 P.3d 706 \(2013\) and review dismissed, \(Apr. 23, 2013\).](#)
- 4 [U.S.—Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 \(1987\).](#)
- 5 [U.S.—Decotiis v. Whittemore, 635 F.3d 22 \(1st Cir. 2011\).](#)
Factors for consideration
[Tex.—Turner v. Perry, 278 S.W.3d 806, 243 Ed. Law Rep. 933 \(Tex. App. Houston 14th Dist. 2009\).](#)
- 6 [U.S.—Demers v. Austin, 746 F.3d 402, 303 Ed. Law Rep. 91 \(9th Cir. 2014\); Clairmont v. Sound Mental Health, 632 F.3d 1091 \(9th Cir. 2011\).](#)
- 7 [U.S.—Gross v. Town of Cicero, Ill., 619 F.3d 697, 77 Fed. R. Serv. 3d 500 \(7th Cir. 2010\).](#)
Hierarchy is relevant but not dispositive
[U.S.—Dahlia v. Rodriguez, 735 F.3d 1060 \(9th Cir. 2013\), cert. denied, 134 S. Ct. 1283, 188 L. Ed. 2d 300 \(2014\).](#)
- 8 [U.S.—Mosholder v. Barnhardt, 679 F.3d 443, 280 Ed. Law Rep. 18 \(6th Cir. 2012\); Meade v. Moraine Valley Community College, 770 F.3d 680, 310 Ed. Law Rep. 88 \(7th Cir. 2014\).](#)
- 9 [U.S.—Farhat v. Jopke, 370 F.3d 580, 188 Ed. Law Rep. 108, 2004 FED App. 0158P \(6th Cir. 2004\).](#)
- 10 [U.S.—Metzger v. DaRosa, 367 F.3d 699 \(7th Cir. 2004\).](#)
[Pa.—Todora v. Buskirk, 96 A.3d 414 \(Pa. Commw. Ct. 2014\).](#)
Intent should be considered
[Wash.—Harrell v. Washington State ex rel. Dept. of Social Health Services, 170 Wash. App. 386, 285 P.3d 159 \(Div. 2 2012\), review granted, 176 Wash. 2d 1011, 297 P.3d 706 \(2013\) and review dismissed, \(Apr. 23, 2013\).](#)
- 11 [U.S.—Mosholder v. Barnhardt, 679 F.3d 443, 280 Ed. Law Rep. 18 \(6th Cir. 2012\); Meade v. Moraine Valley Community College, 770 F.3d 680, 310 Ed. Law Rep. 88 \(7th Cir. 2014\).](#)
- 12 [U.S.—Mosholder v. Barnhardt, 679 F.3d 443, 280 Ed. Law Rep. 18 \(6th Cir. 2012\).](#)
- 13 [U.S.—LeFande v. District of Columbia, 613 F.3d 1155 \(D.C. Cir. 2010\).](#)

- 14 U.S.—*Girten v. Town of Schererville*, 819 F. Supp. 2d 786 (N.D. Ind. 2011); *Russell v. County of Nassau*, 696 F. Supp. 2d 213 (E.D. N.Y. 2010).
Pa.—*Todora v. Buskirk*, 96 A.3d 414 (Pa. Commw. Ct. 2014).
- 15 U.S.—*Meade v. Moraine Valley Community College*, 770 F.3d 680, 310 Ed. Law Rep. 88 (7th Cir. 2014).
- 16 U.S.—*Majchrzak v. County of Wayne*, 838 F. Supp. 2d 586 (E.D. Mich. 2011).
- 17 U.S.—*Craig v. Rich Tp. High School Dist. 227*, 736 F.3d 1110, 299 Ed. Law Rep. 377 (7th Cir. 2013), cert. denied, 134 S. Ct. 2300, 189 L. Ed. 2d 175 (2014).
- 18 U.S.—*Spiering v. City of Madison*, 863 F. Supp. 1065 (D.S.D. 1994).
- 19 U.S.—*Majchrzak v. County of Wayne*, 838 F. Supp. 2d 586 (E.D. Mich. 2011);
U.S.—*Russo v. City of Hartford*, 419 F. Supp. 2d 134 (D. Conn. 2006).

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16B C.J.S. Constitutional Law § 1069

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

c. Standards for Particular Types of Speech

(2) Speech as Job Responsibility, Personal Matter, or Mixed Matters

§ 1069. First Amendment protection of speech in performance of job responsibilities

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1925 to 1963, 2038

A public employee's speech in the performance of job duties or responsibilities is generally not within the protection of the First Amendment guaranty of free speech.

The government may impose restraints on the job-related speech of public employees that would be plainly unconstitutional under the First Amendment if applied to the public at large.¹ Free speech protection under the First Amendment is not afforded to expressions made as part of the speaker's job responsibilities or duties as a public employee.²

Public employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.³ The public duty test is an aspect of determining whether the public employee speaks as a citizen, whose speech is within First Amendment protections,⁴ or solely as a public employee pursuant to official obligations, including both day-to-day duties

and more general responsibilities.⁵ Even so, protection may be afforded speech that is merely related to the speaker's public employment or on the same subject as the speaker's employment provided the requisite element of public concern is present.⁶ The fact that a citizen's speech concerns information acquired by virtue of the citizen's public employment does not transform the speech into employee speech, rather than First Amendment-protected citizen speech, and the critical question is whether the speech at issue is itself ordinarily within the scope of the citizen's duties as a public employee, not whether the speech merely concerns those duties.⁷

The determination of whether a public employee's questioned speech is made pursuant to official responsibilities, and therefore unprotected, is a practical inquiry⁸ that requires a hard look at the context of the speech.⁹ The inquiry is not subject to a bright-line rule since the courts must examine the plaintiff's job responsibilities, the nature of the speech, the relationship between the two, and other contextual factors, including whether the speech was conveyed to the public.¹⁰ Numerous indicia should be considered regarding the scope of the employee's responsibilities, including ad hoc or de facto duties not appearing on any written job description.¹¹ The following nonexclusive list of contextual factors are instructive: whether the employee was commissioned or paid to make the speech in question, the subject matter of the speech, whether the speech was made up the chain of command, whether the employee spoke at the place of employment, whether the speech gave objective observers the impression that the employee represented the employer when speaking, whether the employee's speech derived from special knowledge obtained during the course of the employment, and whether there is a so-called citizen analogue to the speech.¹² Location, audience, and subject matter are not dispositive.¹³

When a public employee's speech owes its existence to the employee's professional responsibilities, it can properly be said to have been made pursuant to the employee's official duties¹⁴ and is not merely tangentially related to the fact of employment.¹⁵ Unprotected statements are those made in the employee's role as an employee, in activities required by the position or undertaken in the course of performing the job,¹⁶ or when the speech reasonably contributes to or facilitates the employee's performance of the official duty.¹⁷ Protection requires that the speaker has no official duty to make the questioned statements or that the statements are not the product of performing tasks which the employee is paid to perform.¹⁸

In a hierarchical employment setting, such as law enforcement, when a public employee raises complaints or concerns up the chain of command at the workplace about the employee's job duties, that speech is undertaken in the course of performing the job, and while it is not dispositive that the speech is made internally, if the employee takes job concerns outside the workplace, then the external communications are made, not as an employee but as a citizen and are protected.¹⁹

Simply because public employment provides a factual predicate for the expressive activity, speech does not owe its existence to a public employee's professional responsibilities and thus lose its First Amendment protection; it must appear that the speech is made pursuant to official duties in the sense that it is the government employees' work product, commissioned or created by the employer.²⁰

CUMULATIVE SUPPLEMENT

Cases:

In general, when public employees are performing their job duties, their speech may be controlled by their employer. [U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 \(2018\).](#)

Public high school football coach spoke as a public employee, rather than as a private citizen, when he kneeled and prayed in center of field immediately after games in full view of spectators and likely surrounded by students who felt pressured

to join coach, and thus speech was not insulated from employer discipline under First Amendment; coach had insisted that speech occur while players stood next to him and fans watched from stands, and he repeatedly acknowledged that he was a mentor, motivational speaker, and role model to students at conclusion of games, coach's job responsibilities extended at least until players were released after going to locker room, and school district specifically instructed coach to continue to provide motivational, inspirational talks to students before, during, and after games. [U.S. Const. Amend. 1. Kennedy v. Bremerton School District, 991 F.3d 1004 \(9th Cir. 2021\).](#)

Clerk of county board of supervisors, who was also special districts coordinator, spoke as public employee, rather than private citizen, when she made presentations to board in which she discussed her concerns about special district accounting violations and government waste, and thus her speech was not protected by First Amendment; clerk's job required her to present special district information at board meetings, and specific presentations she gave were at behest of board, which set aside time for her to present her concerns. [U.S. Const. Amend. 1. Wayman-Trujillo v. County of Yavapai, 733 Fed. Appx. 346 \(9th Cir. 2018\).](#)

It was not clearly established that statements by sheriff's department's head of internal affairs to media regarding missing internal affairs document were not made pursuant to her official duties, and thus sheriff was entitled to qualified immunity from liability in official's § 1983 action alleging First Amendment retaliation, even if her formal job duties did not require her to speak to media, and she disobeyed sheriff's instructions on what to say; sheriff had ordered her to speak to media and deliver false narrative, and there was no applicable precedent as to whether her disobedience affected whether she was speaking as part of her official duties. [U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. Lincoln v. Maketa, 880 F.3d 533 \(10th Cir. 2018\).](#)

High school employee, who worked as a campus supervisor, acted in a capacity students might reasonably have viewed as official when she told students to video-record alleged police brutality during a fight in school's parking lot, and thus she spoke as a public employee and not as a citizen during the incident, and thus her speech was not protected under the First Amendment; employee was placed in a position of trust and authority over students, she was on duty, had her radio with her, and was engaged in carrying out her job responsibilities of responding to a call of disturbance, intervening in the disturbance, and preventing a student fight, and her order to the students to record the police was something no private citizen would have done. [U.S. Const. Amend. 1. Toney v. Young, 238 F. Supp. 3d 1234, 345 Ed. Law Rep. 895 \(E.D. Cal. 2017\).](#)

Even if state employee's speech addressing contractors on safety and hazards addressed a matter of public concern, he spoke pursuant to his official job duties as an assistant building construction engineer for New York State Office of General Services, rather than as a citizen, and thus, his speech was not constitutionally protected and could not serve as the basis of a First Amendment retaliation claim; employee's speech, including directing a contractor to remove his air changing and dehumidification equipment, requesting a contractor get his equipment back on site, and making comments to a contractor regarding improper use of a ladder and lack of use of hard hats with overhead hazards, was rooted in his responsibility to supervise and direct the contractor that was hired to complete a project. [U.S. Const. Amend. 1. Lefebvre v. Morgan, 234 F. Supp. 3d 445 \(S.D. N.Y. 2017\).](#)

City marshal, in criticizing city's parking violation enforcement program, spoke pursuant to his official job duties and not as a citizen, and thus his speech was not protected under First Amendment; marshal's job duties included enforcing parking violations, speech was not made to public at large, and marshal's criticisms were result of knowledge he gained through his official job duties. [U.S.C.A. Const. Amend. 1. Airday v. City of New York, 131 F. Supp. 3d 174 \(S.D. N.Y. 2015\).](#)

County employee's reporting of county auditor's misuse of public resources by printing his campaign materials on county's printer was protected speech, under First Amendment, on grounds that employee was speaking as private citizen addressing matters of public concern, rather than speaking pursuant to her job duties as information technology manager that did not include reporting of suspected government corruption or criminal activity occurring in workplace, even though her discovery of auditor's conduct was made as result of her job duties in reviewing print logs as part of print study. [U.S. Const. Amend. 1. Ehrlich v. Kovack, 135 F. Supp. 3d 638 \(N.D. Ohio 2015\).](#)

Public employee's speech to county investigator about coworker's alleged misconduct, including forging signatures on village checks and forgiving water bills that should not have been forgiven, was constitutionally protected speech of a private citizen, where employee reported misconduct outside established channels and in an area for which she did not have formal responsibilities, while off-duty and on her own time. [U.S. Const. Amend. 1. Swanson v. Village of Frederic, 341 F. Supp. 3d 965 \(W.D. Wis. 2018\).](#)

Professor at state university spoke as a citizen, rather than as a public employee, in his letters to local newspaper criticizing university's administration, in context of professor's [§ 1983](#) action alleging retaliation by university for his exercise of free expression rights, though professor identified himself in those comments as a public employee and spoke about issues related to his employment based on information obtained in his employment; professor's official duties did not include making public statements on behalf of university regarding subject matter of his letters, nor did they include creating the statements published in newspaper. [U.S.C.A. Const. Amend. 1; 42 U.S.C.A. § 1983. Sadid v. Idaho State University, 151 Idaho 932, 265 P.3d 1144, 274 Ed. Law Rep. 1039 \(2011\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—U.S. v. National Treasury Employees Union, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 \(1995\).](#)
Restrictions are less problematic
- 2 [U.S.—Werkheiser v. Pocono Tp., 780 F.3d 172 \(3d Cir. 2015\).](#)
[U.S.—Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\); Werkheiser v. Pocono Tp., 780 F.3d 172 \(3d Cir. 2015\); Haverda v. Hays County, 723 F.3d 586 \(5th Cir. 2013\); Pucci v. Nineteenth Dist. Court, 628 F.3d 752 \(6th Cir. 2010\); Bonn v. City of Omaha, 623 F.3d 587 \(8th Cir. 2010\); Chavez-Rodriguez v. City of Santa Fe, 596 F.3d 708 \(10th Cir. 2010\).](#)
[Idaho—Sadid v. Idaho State University, 154 Idaho 88, 294 P.3d 1100, 289 Ed. Law Rep. 358 \(2013\).](#)
[Me.—Quintal v. City of Hallowell, 2008 ME 155, 956 A.2d 88 \(Me. 2008\).](#)
[Or.—Huber v. Oregon Dept. of Educ., 235 Or. App. 230, 230 P.3d 937 \(2010\).](#)
- 3 [U.S.—Reinhardt v. Albuquerque Public Schools Bd. of Educ., 595 F.3d 1126, 253 Ed. Law Rep. 567 \(10th Cir. 2010\).](#)
- 4 [§ 1059.](#)
- 5 [U.S.—Dahlia v. Rodriguez, 689 F.3d 1094 \(9th Cir. 2012\), on reh'g en banc, 735 F.3d 1060 \(9th Cir. 2013\), cert. denied, 134 S. Ct. 1283, 188 L. Ed. 2d 300 \(2014\).](#)
- 6 [§ 1066.](#)
- 7 [U.S.—Lane v. Franks, 134 S. Ct. 2369, 189 L. Ed. 2d 312 \(2014\).](#)
[Tex.—Turner v. Perry, 278 S.W.3d 806, 243 Ed. Law Rep. 933 \(Tex. App. Houston 14th Dist. 2009\).](#)
- 8 [U.S.—Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\).](#)
- 9 [U.S.—Mpoy v. Rhee, 758 F.3d 285, 307 Ed. Law Rep. 627 \(D.C. Cir. 2014\).](#)
Focus on core job functions too narrow
[U.S.—Davis v. Cook County, 534 F.3d 650 \(7th Cir. 2008\).](#)
- 10 [U.S.—Ross v. Breslin, 693 F.3d 300, 284 Ed. Law Rep. 42 \(2d Cir. 2012\).](#)
- 11 [U.S.—Pucci v. Nineteenth Dist. Court, 628 F.3d 752 \(6th Cir. 2010\).](#)
Not limited to job description
[U.S.—Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\); Weintraub v. Board of Educ. of City School Dist. of City of New York, 593 F.3d 196, 253 Ed. Law Rep. 17 \(2d Cir. 2010\).](#)
- 12 [U.S.—Decotiis v. Whittemore, 635 F.3d 22 \(1st Cir. 2011\).](#)
- 13 [U.S.—Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\).](#)

- 14 U.S.—*Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *O'Connell v. Marrero-Recio*, 724 F.3d 117 (1st Cir. 2013); *Looney v. Black*, 702 F.3d 701 (2d Cir. 2012); *Hagen v. City of Eugene*, 736 F.3d 1251 (9th Cir. 2013).
- Idaho—*Sadid v. Idaho State University*, 154 Idaho 88, 294 P.3d 1100, 289 Ed. Law Rep. 358 (2013).
- 15 Idaho—*Sadid v. Idaho State University*, 154 Idaho 88, 294 P.3d 1100, 289 Ed. Law Rep. 358 (2013).
- 16 U.S.—*Haverda v. Hays County*, 723 F.3d 586 (5th Cir. 2013).
- 17 U.S.—*Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708 (10th Cir. 2010).
- 18 U.S.—*Dahlia v. Rodriguez*, 689 F.3d 1094 (9th Cir. 2012), on reh'g en banc, 735 F.3d 1060 (9th Cir. 2013), cert. denied, 134 S. Ct. 1283, 188 L. Ed. 2d 300 (2014).
- 19 U.S.—*Haverda v. Hays County*, 723 F.3d 586 (5th Cir. 2013).
- 20 U.S.—*Chrzanowski v. Bianchi*, 725 F.3d 734 (7th Cir. 2013), cert. denied, 134 S. Ct. 2870, 189 L. Ed. 2d 832 (2014).

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16B C.J.S. Constitutional Law § 1070

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

c. Standards for Particular Types of Speech

(2) Speech as Job Responsibility, Personal Matter, or Mixed Matters

§ 1070. First Amendment protection of speech on personal matters

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1929

The First Amendment guaranty of free speech does not provide workplace protection to public employees with respect to statements that address purely personal matters.

The First Amendment guaranty of free speech does not provide workplace protection to public employees from adverse employment actions with respect to statements that address purely personal matters.¹ When a public employee speaks as an employee on matters of personal interest, the courts are not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.²

Determining whether of a public employee's speech is purely personal may also involve considering whether the employee is speaking in the performance of official responsibilities or duties, which also removes First Amendment protections.³ In addition, by definition, a purely personal expression is the opposite of a statement of a matter of public concern,⁴ and does not meet

the public concern test, as a basis for protected citizen speech by a public employee.⁵ Mixed statements, however, present a different question and may warrant protection to the extent of a predominant matter of public concern.⁶ A public employee may not transform a personal grievance into a matter of public concern by invoking a supposed public interest in the way a governmental agency is run.⁷

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Footnotes

- 1 U.S.—*Meade v. Moraine Valley Community College*, 770 F.3d 680, 310 Ed. Law Rep. 88 (7th Cir. 2014); *Eisenhour v. Weber County*, 744 F.3d 1220 (10th Cir. 2014); *Carter v. City of Melbourne, Fla.*, 731 F.3d 1161 (11th Cir. 2013).
Mont.—*Ray v. Montana Tech of University of Montana*, 2007 MT 21, 335 Mont. 367, 152 P.3d 122, 216 Ed. Law Rep. 669 (2007).
Neb.—*Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014).
N.H.—*Snelling v. City of Claremont*, 155 N.H. 674, 931 A.2d 1272 (2007).
- 2 U.S.—*Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531 (6th Cir. 2012).
Mo.—*Dooley v. St. Louis County*, 187 S.W.3d 882 (Mo. Ct. App. E.D. 2006).
- 3 § 1069.
- 4 U.S.—*Singer v. Ferro*, 711 F.3d 334 (2d Cir. 2013); *Demers v. Austin*, 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014); *Eisenhour v. Weber County*, 744 F.3d 1220 (10th Cir. 2014).
La.—*McGowan v. Housing Authority of New Orleans*, 113 So. 3d 1143 (La. Ct. App. 4th Cir. 2013).
Wash.—*Harrell v. Washington State ex rel. Dept. of Social Health Services*, 170 Wash. App. 386, 285 P.3d 159 (Div. 2 2012), review granted, 176 Wash. 2d 1011, 297 P.3d 706 (2013) and review dismissed, (Apr. 23, 2013).
Tenn.—*King v. Betts*, 354 S.W.3d 691 (Tenn. 2011).
- 5 §§ 1066 to 1068.
- 6 § 1071.
- 7 U.S.—*Carter v. City of Melbourne, Fla.*, 731 F.3d 1161 (11th Cir. 2013).

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16B C.J.S. Constitutional Law § 1071

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

c. Standards for Particular Types of Speech

(2) Speech as Job Responsibility, Personal Matter, or Mixed Matters

§ 1071. First Amendment protection of mixed speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑1930

The First Amendment may provide protection with respect to public employee statements that address mixed public and personal matters, constituting "mixed speech" depending on whether the personal or public interest predominates.

When a public employee speaks both as a citizen and as an employee in a "mixed speech" case, the employee's speech can be protected under the First Amendment from adverse employment action.¹ Having a personal stake or motive in speaking does not, on its own, vitiate the status of the speech as addressing a matter of public concern for purposes of a First Amendment retaliation claim.² The question is generally one of the employee's motive in speaking as including a desire to help the public in addition to the employee's private motivations or interests.³ When the speech at issue involves mixed questions of private and public concern, the court must make a factual determination whether the employee's personal interest predominates over the employee's interest as a citizen.⁴ It is not necessary for the entire expression at issue to address matters of public concern as long as some portion of the speech does.⁵

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Footnotes

- 1 U.S.—*Kristofek v. Village of Orland Hills*, 712 F.3d 979 (7th Cir. 2013); *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 238 Ed. Law Rep. 537 (9th Cir. 2008).
Involves scintilla of public concern
U.S.—*Stotter v. University of Texas at San Antonio*, 508 F.3d 812, 227 Ed. Law Rep. 569 (5th Cir. 2007).
- 2 U.S.—*Cioffi v. Averill Park Central School Dist. Board of Ed.*, 444 F.3d 158, 208 Ed. Law Rep. 36 (2d Cir. 2006).
As to the requirement of a matter of public concern, generally, see §§ 1066 to 1068.
- 3 U.S.—*Kristofek v. Village of Orland Hills*, 712 F.3d 979 (7th Cir. 2013); *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 238 Ed. Law Rep. 537 (9th Cir. 2008).
- 4 U.S.—*Bailey v. Department of Elementary and Secondary Educ.*, 451 F.3d 514 (8th Cir. 2006).
- 5 U.S.—*Westmoreland v. Sutherland*, 662 F.3d 714 (6th Cir. 2011).

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16B C.J.S. Constitutional Law § 1072

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

d. Public Employee Labor Activities or Organizations

§ 1072. First Amendment protection of speech regarding labor activities or organizations

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1960 to 1963

The First Amendment guaranty of free speech encompasses the right of public employees to speak regarding their right to join, form, and participate in labor organizations.

Generally, the extension of First Amendment free speech protections to public employees against adverse employment actions by the government employer requires satisfying the test for an expression on a matter of public concern¹ as limited by the rule that the First Amendment does not protect a public employee's speech in the performance of job duties² or on mere personal matters.³ For this purpose, however, the right of public employees to join, form, and participate in labor organizations⁴ is a matter of public concern about which public employees must have the protected freedom to speak.⁵

Consistent with principle that incidental references to public issues do not elevate statements to matters of public concern in a public employment context, an employee engaged in union activity must go beyond the fact that the employee's actions occurred on behalf of others in a union context and must demonstrate that the focus of the employee's conduct was fairly related to

any matter of political, social, or other concern to community as required under the public concern test.⁶ A public employee's speech cannot be deemed to involve matters of public concern simply because it relates to union matters,⁷ or occurs at a union meeting,⁸ including speech regarding matters of wages, work hours, and working conditions,⁹ unless the employee is speaking the capacity of a union representative.¹⁰

Statements in the context of an internal union grievance proceeding by a public employee may constitute protected statements on matters of public concern if the substance of the grievance does not fall within the employee's work duties and address broad policy questions regarding the operations of a public employer.¹¹ Statements that constitute mere personal employee grievances are not speech on a matter of public concern even though the speech goes to statements made during labor committee meetings¹² or concerns working conditions that affect union members.¹³ Voicing private concerns about treatment by a public employer, even in the context of a union grievance process, is not protected as public concern speech.¹⁴

Statements made while acting in a capacity as a public employee on duty, relating to official employment policy, and meeting the employee's obligations as an employee, are not protected statements on matters of public concern even if the matter affects union members.¹⁵ The lodging of a union grievance, as a form or channel of communication not available to nonemployee citizens, is not speech protected as citizen speech outside the scope of a public employee's official duties in contrast to a letter by the employee to a news editor or to an elected representative or to a government inspector general.¹⁶

Balancing interests.

Even if the public employee's union related speech or activity does constitute a matter of public concern, the balancing of interests between the public employer and the public employee must weigh in favor of recognizing the right to comment in the manner and context questioned, particularly in relation to the potential for disruption of the workplace, employee discipline and morale, disharmony, and the general efficiency of the employer.¹⁷

CUMULATIVE SUPPLEMENT

Cases:

Employee, who was interim executive secretary of county detention center, did not act on matters of public concern when she sent text message notifying officers about steps in union's formation, including county manager's offer to speak individually with officers, thus precluding her § 1983 First Amendment retaliation claim based on sending of text message; logistics in forming union at detention center addressed personal workplace concerns, which did not relate to matter of political, social, or other concern to community. [U.S. Const. Amend. 1](#); [42 U.S.C.A. § 1983](#). [Sinfuego v. Curry County Board of County Commissioners](#), 360 F. Supp. 3d 1177 (D.N.M. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 §§ 1066 to 1068.
- 2 § 1069.
- 3 § 1070.
- 4 § 1073.

- 5 U.S.—*Davignon v. Hodgson*, 524 F.3d 91 (1st Cir. 2008); *Cillo v. City of Greenwood Village*, 739 F.3d 451 (10th Cir. 2013); *Smith v. Atlanta Independent School Dist.*, 633 F. Supp. 2d 1364, 248 Ed. Law Rep. 286 (N.D. Ga. 2009); *Frisenda v. Incorporated Village of Malverne*, 775 F. Supp. 2d 486 (E.D. N.Y. 2011).
- 6 U.S.—*Golembiewski v. Logie*, 852 F. Supp. 2d 908, 283 Ed. Law Rep. 179 (N.D. Ohio 2012), judgment aff'd, 516 Fed. Appx. 476, 295 Ed. Law Rep. 39 (6th Cir. 2013), cert. denied, 134 S. Ct. 213, 187 L. Ed. 2d 161 (2013).
- 7 U.S.—*Toth v. California University of Pennsylvania*, 844 F. Supp. 2d 611, 282 Ed. Law Rep. 257 (W.D. Pa. 2012).
Neb.—*Fraternal Order of Police v. County of Douglas*, 270 Neb. 118, 699 N.W.2d 820 (2005), opinion modified on other grounds on denial of reh'g, *Fraternal Order of Police, Lodge No. 8 v. County of Douglas*, 270 Neb. 469, 745 N.W.2d 883 (2005).
- 8 U.S.—*Olendzki v. Rossi*, 765 F.3d 742 (7th Cir. 2014); *Nagle v. Village of Calumet Park*, 554 F.3d 1106 (7th Cir. 2009).
- 9 U.S.—*Smith v. Atlanta Independent School Dist.*, 633 F. Supp. 2d 1364, 248 Ed. Law Rep. 286 (N.D. Ga. 2009).
- 10 § 1073.
- 11 U.S.—*Shefcik v. Village of Calumet Park*, 532 F. Supp. 2d 965 (N.D. Ill. 2007); *Ho-Chuan Chen v. Dougherty*, 625 F. Supp. 2d 1091 (W.D. Wash. 2008).
Protected discussion in representative process
U.S.—*Graber v. Clarke*, 763 F.3d 888 (7th Cir. 2014).
- 12 U.S.—*Olendzki v. Rossi*, 765 F.3d 742 (7th Cir. 2014).
- 13 U.S.—*Bivens v. Trent*, 591 F.3d 555 (7th Cir. 2010).
- 14 U.S.—*Gwynn v. City of Philadelphia*, 866 F. Supp. 2d 473 (E.D. Pa. 2012), aff'd, 719 F.3d 295, 85 Fed. R. Serv. 3d 1487 (3d Cir. 2013).
- 15 U.S.—*Swearnigen-El v. Cook County Sheriff's Dept.*, 602 F.3d 852 (7th Cir. 2010).
- 16 U.S.—*Perkins v. City of Attleboro*, 969 F. Supp. 2d 158, 86 Fed. R. Serv. 3d 1187 (D. Mass. 2013).
- 17 U.S.—*Golembiewski v. Logie*, 852 F. Supp. 2d 908, 283 Ed. Law Rep. 179 (N.D. Ohio 2012), judgment aff'd, 516 Fed. Appx. 476, 295 Ed. Law Rep. 39 (6th Cir. 2013), cert. denied, 134 S. Ct. 213, 187 L. Ed. 2d 161 (2013).
As to the balance of interests test, generally, see § 1062.

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16B C.J.S. Constitutional Law § 1073

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

d. Public Employee Labor Activities or Organizations

§ 1073. First Amendment protection of right to join, form, and participate in labor organization

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1960 to 1963

The First Amendment guaranty of free speech encompasses the right of public employees to join, form, and participate in labor organizations.

The First Amendment right of free speech guarantees to public employees the right to join and participate in a labor union, including the right to associate and speak freely without retaliation for doing so.¹ Retaliation against public employees solely for their union activities violates the First Amendment² as public employee union membership alone is sufficient to establish a matter of public concern for purposes of extending First Amendment protection from retaliation against an employee for union membership.³ A public employee's association with a union and any speech that arises from the employee's position in the union is protected.⁴

A public employee's speech in the capacity of a union representative is protected speech and not speech within the purview of the employee's official duties as a public employee.⁵ The government may not prohibit speech by an employee association's

representatives concerning employment conditions, without a substantial governmental interest,⁶ but the investigation of a union representative's alleged wrongdoing by the state is not an infringement of the union's rights of protected expression.⁷ A union's communications to member employees in response to members' personal grievances is not a protected matter of public concern.⁸

The First Amendment does not impose any affirmative obligation on the government to listen to, respond to, or recognize an association of public employees.⁹ Further, the right of freedom of speech does not include the right to compel a public employer to bargain collectively with a union chosen by the employees.¹⁰

The Free Speech Clause does not give unpaid volunteer public workers the right to engage in collective bargaining.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Public-sector union speech in collective bargaining, including speech about wages and benefits, involved matters of great public concern, and thus was subject to First Amendment protections; in addition to affecting how public money was spent, union speech in collective bargaining addressed many other important matters, such as education, child welfare, healthcare, and minority rights. [U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 \(2018\).](#)

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Footnotes

- 1 U.S.—[Smith v. Arkansas State Highway Emp., Local 1315](#), 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979); [Cillo v. City of Greenwood Village](#), 739 F.3d 451 (10th Cir. 2013).
Mo.—[Service Employees Intern. Union Local 2000 v. State](#), 214 S.W.3d 368 (Mo. Ct. App. W.D. 2007).
Wis.—[Madison Teachers, Inc. v. Walker](#), 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 (2014).
- 2 U.S.—[Davignon v. Hodgson](#), 524 F.3d 91 (1st Cir. 2008); [Clue v. Johnson](#), 179 F.3d 57 (2d Cir.1999).
Wis.—[Madison Teachers, Inc. v. Walker](#), 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 (2014).
Speech too far removed from discipline
U.S.—[Swearnigen-El v. Cook County Sheriff's Dept.](#), 602 F.3d 852 (7th Cir. 2010).
- 3 U.S.—[Cobb v. Pozzi](#), 363 F.3d 89 (2d Cir. 2004); [Maglietti v. Nicholson](#), 517 F. Supp. 2d 624 (D. Conn. 2007); [Donovan v. Incorporated Village of Malverne](#), 547 F. Supp. 2d 210 (E.D. N.Y. 2008).
- 4 U.S.—[Frisenda v. Incorporated Village of Malverne](#), 775 F. Supp. 2d 486 (E.D. N.Y. 2011).
- 5 U.S.—[Olendzki v. Rossi](#), 765 F.3d 742 (7th Cir. 2014); [Graber v. Clarke](#), 763 F.3d 888 (7th Cir. 2014); [Ellins v. City of Sierra Madre](#), 710 F.3d 1049 (9th Cir. 2013).
- 6 U.S.—[Hickory Fire Fighters Ass'n, Local 2653 of Intern. Ass'n of Fire Fighters v. City of Hickory, N. C.](#), 656 F.2d 917 (4th Cir. 1981).
- 7 U.S.—[State Troopers Fraternal Ass'n of New Jersey, Inc. v. New Jersey](#), 585 Fed. Appx. 828 (3d Cir. 2014).
- 8 U.S.—[Booth v. Pasco County, Fla.](#), 757 F.3d 1198 (11th Cir. 2014).
- 9 U.S.—[Smith v. Arkansas State Highway Emp., Local 1315](#), 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979).
Wis.—[Madison Teachers, Inc. v. Walker](#), 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 (2014).
- 10 U.S.—[Smith v. Arkansas State Highway Emp., Local 1315](#), 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979).
Pa.—[Philadelphia Fraternal Order of Correctional Officers v. Rendell](#), 558 Pa. 229, 736 A.2d 573 (1999).

11

U.S.—[Griffith v. Lanier](#), 521 F.3d 398 (D.C. Cir. 2008).

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16B C.J.S. Constitutional Law § 1074

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

11. Public Office or Public Employment, in General

d. Public Employee Labor Activities or Organizations

§ 1074. Permissible restraints under First Amendment of particular labor activities; dues or fees

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1960 to 1963

The First Amendment guaranty of free speech protects public employees' participation in particular union activities; permissible restraints may apply to compulsory union dues, fees, or assessments, particularly as applied to nonmembers.

A statute requiring public employers to engage in official exchanges of view only with their professional employees' exclusive representatives on policy questions relating to employment, outside the scope of mandatory bargaining, does not infringe on the First Amendment free speech rights of professional employees not represented by the exclusive representatives.¹

Public employee labor unions, like unions generally, have no constitutional right to the fees of nonmember employees.² The First Amendment does not prevent a state from prohibiting public employers from providing payroll deductions for union activities.³ A provision to this effect, in a right-to-work state, does not restrict speech but rather declines to promote speech by allowing public employee union fee deductions.⁴

Public employees may be subject to an agency shop collective bargaining agreement including a "fair share" requirement for the payment of service charges used to finance union expenditures for collective bargaining, contract administration, and grievance adjustment, but it does not violate the First Amendment for a state to require that its public-sector labor unions receive affirmative authorization from a nonmember before spending that nonmember's agency-shop fees for election-related purposes.⁵ A "fair share" requirement may not extend to compulsory charges, dues, or assessments for ideological causes not germane to the union's duties as a collective bargaining representative.⁶ Public sector unions collecting agency fees must observe prescribed procedural requirements in order to ensure that an objecting nonmember can prevent the use of the nonmember's fees for impermissible purposes.⁷

A statute may not require nonunion assistant public workers—who are government funded but not full-fledged employees while nonetheless part of a state employees bargaining unit—to pay union fees for union representation when they do not choose union representation, absent a compelling state interest for the requirement that cannot be served by a significantly less restrictive means.⁸

CUMULATIVE SUPPLEMENT

Cases:

First Amendment, as originally understood, did not allow forced subsidies such as those authorized by Illinois' agency-fee scheme, under which public-sector unions could charge nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative; there was no accepted founding-era practice that even remotely resembled the compulsory assessment of agency fees from public-sector employees, and prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. [U.S.C.A. Const.Amend. 1;S.H.A. 5 ILCS 315/3\(g\), 315/6\(e\). Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 \(2018\).](#)

Statute precluding public employers from deducting union dues from general employees paychecks did not infringe union members' First Amendment speech or expression rights; state was not constitutionally obligated to provide payroll deductions at all, and statute did not tie public employees use of the state's payroll system to speech on any particular viewpoint. [U.S. Const. Amend. 1; Wis. Stat. Ann. § 111.70. International Union of Operating Engineers, Local 139, AFL-CIO v. Daley, 983 F.3d 287 \(7th Cir. 2020\).](#)

California education code provision requiring school employees' requests for cancellation of union dues payroll deductions to be made in writing to union did not violate employees' First Amendment rights; employees did not have constitutional right to resign from unions in whichever manner they preferred, and provision's requirement of submitting requests in writing to union was not unduly burdensome. [U.S. Const. Amend. 1; Cal. Educ. Code § 45060. Babb v. California Teachers Association, 378 F. Supp. 3d 857 \(C.D. Cal. 2019\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299, 15 Ed. Law Rep. 1050 \(1984\).](#)
- 2 [U.S.—Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 \(2007\).](#)

Wis.—*Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 (2014).

3 U.S.—*Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 72 A.L.R.6th 751 (2009); *Bailey v. Callaghan*, 715 F.3d 956, 293 Ed. Law Rep. 675 (6th Cir. 2013); *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 84 Fed. R. Serv. 3d 1143 (7th Cir. 2013).

4 U.S.—*Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 72 A.L.R.6th 751 (2009).

5 U.S.—*Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

6 U.S.—*Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

Chargeable dissenter fees

U.S.—*Seidemann v. Bowen*, 584 F.3d 104, 249 Ed. Law Rep. 638 (2d Cir. 2009).

Violation by particular fee charges

U.S.—*Scheffer v. Civil Service Employees Ass'n, Local 828*, 610 F.3d 782 (2d Cir. 2010).

7 U.S.—*Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232, 30 Ed. Law Rep. 649 (1986) (cited with approval by, *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007)).

8 U.S.—*Harris v. Quinn*, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014).

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16B C.J.S. Constitutional Law § 1075

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

a. In General

§ 1075. General protection and limitation of First Amendment rights in public education

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1965, 2005

The First Amendment guaranty of free speech and press applies to speech in public schools, colleges, and universities, but its exercise may be restricted to avoid interference with the operation of the institutions.

The right of free speech is nowhere more vital than in public schools and universities,¹ and the right of freedom of speech and the press extends to the premises of public schools, colleges, and universities.²

School officials, however, consistent with fundamental constitutional safeguards, have comprehensive authority to prescribe and control conduct in public schools³ and have broad discretion to restrict school speech in order to further educational goals.⁴ A public school has the power to regulate speech to prevent problems before they occur, and the school is not limited to prohibiting and punishing conduct only after the conduct has caused a disturbance.⁵

In addition to general protections and constraints, speech restrictions in public schools are viewed primarily through a lens of the speaker's identity,⁶ requiring a particularly targeted analysis in relation to student expression,⁷ a public employee analysis in relation to teachers,⁸ and a forum analysis applicable to speech by outsiders on the school premises or using school facilities.⁹ School sponsored speech, or speech that can reasonably be viewed as the school's own speech, is subject to regulation by school officials, apart from the other standards.¹⁰

In the public school setting, the school may permissibly regulate a broader range of speech than could be regulated for the general public, giving school regulations a larger plainly legitimate sweep.¹¹ More leeway is granted to school administrators in public elementary or secondary schools to restrict or control speech than in a university setting.¹² The First Amendment protects the nondisruptive expression of ideas and does not erect a shield that handicaps the proper functioning of the public schools.¹³

CUMULATIVE SUPPLEMENT

Cases:

Public employee speech doctrine, which was used to evaluate restraints on a public employee's speech, was not applicable to state university's decision to deny application of secondary education student for student teaching certification based on his comments regarding student sexuality and disabled students, where student was not a public employee, but rather was an applicant to a university program that could have permitted him to teach at a secondary school and work to become eligible to be certified as a teacher, and doctrine provided no basis for considering role of academic freedom at public universities. [U.S.C.A. Const.Amend. 1. Oyama v. University of Hawaii, 813 F.3d 850 \(9th Cir. 2015\).](#)

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Footnotes

- 1 [U.S.—Kleindienst v. Mandel, 408 U.S. 753, 92 S. Ct. 2576, 33 L. Ed. 2d 683 \(1972\).](#)
- 2 [U.S.—Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440, 1 Ed. Law Rep. 13 \(1981\).](#)
State universities
[U.S.—McCauley v. University of the Virgin Islands, 54 V.I. 849, 618 F.3d 232, 260 Ed. Law Rep. 551 \(3d Cir. 2010\); Flint v. Dennison, 488 F.3d 816, 221 Ed. Law Rep. 514 \(9th Cir. 2007\).](#)
[Wis.—Board of Regents-UW System v. Decker, 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112, 306 Ed. Law Rep. 1005 \(2014\).](#)
- 3 [U.S.—Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 \(1969\).](#)
- 4 [U.S.—Conward v. Cambridge School Committee, 171 F.3d 12, 133 Ed. Law Rep. 367 \(1st Cir. 1999\).](#)
- 5 [U.S.—Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 290 Ed. Law Rep. 484 \(4th Cir. 2013\), cert. denied, 134 S. Ct. 201, 187 L. Ed. 2d 46 \(2013\).](#)
- 6 [U.S.—K.A. ex rel. Ayers v. Pocono Mountain School Dist., 710 F.3d 99, 290 Ed. Law Rep. 446 \(3d Cir. 2013\).](#)
- 7 [§ 1090.](#)
- 8 [§§ 1082, 1084.](#)
- 9 [§§ 1077, 1078.](#)
- 10 [U.S.—Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Ed. Law Rep. 515 \(1988\); K.A. ex rel. Ayers v. Pocono Mountain School Dist., 710 F.3d 99, 290 Ed. Law Rep. 446 \(3d Cir. 2013\).](#)

As to the application of school-sponsored speech to student speech, see § 1092.

11 U.S.—*J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).

12 U.S.—*Murakowski v. University of Delaware*, 575 F. Supp. 2d 571, 238 Ed. Law Rep. 106 (D. Del. 2008).
Academic speech accorded deference

U.S.—*DeJohn v. Temple University*, 537 F.3d 301, 235 Ed. Law Rep. 745 (3d Cir. 2008); *Rodriguez v. Maricopa County Community College Dist.*, 605 F.3d 703, 257 Ed. Law Rep. 30 (9th Cir. 2010).

13 U.S.—*Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 170 Ed. Law Rep. 83 (3d Cir. 2002).

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16B C.J.S. Constitutional Law § 1076

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

a. In General

§ 1076. Particular standards and interests for limitation of First Amendment rights in public education

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1965, 2005

Public schools may institute reasonable content-neutral restrictions on the time, place, and manner of protected speech without violating the First Amendment guaranty of free speech when supported by sufficient interests and narrowly tailored to serve those interests.

School speech regulations must be supported by a sufficiently important interest to restrict the First Amendment guaranty of free speech,¹ and the schools have a compelling interest in having an undisrupted school session conducive to the students' learning,² thus permitting the regulation or proscription of speech that disrupts education, causes disorder, or inappropriately interferes with other students' rights.³ A public school's objective of educating its students in a learning environment conducive to fostering both knowledge and democratic responsibility is a substantial government interest for purposes of speech regulation.⁴

Public schools may institute content-neutral restrictions on speech without violating the First Amendment.⁵ Schools may restrict the time, place, and manner of protected speech, but to withstand constitutional scrutiny, the restrictions must (1) be content-neutral, in that they target some quality other than substantive expression, (2) be narrowly tailored to serve a significant governmental interest, and (3) permit alternative channels for expression.⁶ Schools may not suppress speech merely to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.⁷

A public school may categorically prohibit speech that is: (1) lewd, vulgar, or profane; (2) school-sponsored speech on the basis of a legitimate pedagogical concern; and (3) speech that advocates illegal drug use; if school speech does not fit within one of those exceptions, it may be prohibited only if it would substantially disrupt school operations.⁸

School regulations which affect speech must be certain and must not be overbroad,⁹ but the duties and responsibilities of the public elementary and secondary schools warrant a more hesitant application of the over-breadth doctrine than in other contexts.¹⁰

Government speech.

"Government speech" in schools concerns situations in which the school, as the government itself, is the speaker, and is exempt from First Amendment considerations,¹¹ allowing viewpoint-based choices and the choice of what to say and what not to say.¹²

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Footnotes

- 1 U.S.—*Good News Club v. Milford Central School*, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001); *Crue v. Aiken*, 370 F.3d 668, 188 Ed. Law Rep. 156, 58 Fed. R. Serv. 3d 665 (7th Cir. 2004).
- 2 U.S.—*Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).
- 3 U.S.—*Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).
- Safety and security interests**
- U.S.—*Rock for Life-UMBC v. Hrabowski*, 643 F. Supp. 2d 729, 250 Ed. Law Rep. 235 (D. Md. 2009), *aff'd*, 411 Fed. Appx. 541, 266 Ed. Law Rep. 689 (4th Cir. 2010).
- 4 U.S.—*Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 262 Ed. Law Rep. 53 (6th Cir. 2010).
- 5 U.S.—*Palmer ex rel. Palmer v. Waxahachie Independent School Dist.*, 579 F.3d 502, 248 Ed. Law Rep. 579 (5th Cir. 2009).
- 6 U.S.—*M.B. ex rel. Martin v. Liverpool Central School Dist.*, 487 F. Supp. 2d 117, 221 Ed. Law Rep. 79 (N.D. N.Y. 2007).
- 7 U.S.—*B.W.A. v. Farmington R-7 School Dist.*, 554 F.3d 734, 241 Ed. Law Rep. 41 (8th Cir. 2009).
- 8 U.S.—*DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 225 Ed. Law Rep. 896 (D.N.J. 2007); *H. v. Easton Area School Dist.*, 827 F. Supp. 2d 392, 279 Ed. Law Rep. 655 (E.D. Pa. 2011), *aff'd*, 725 F.3d 293, 296 Ed. Law Rep. 752 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1515, 188 L. Ed. 2d 450, 302 Ed. Law Rep. 485 (2014).
- 9 U.S.—*J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011); *McCauley v. University of the Virgin Islands*, 54 V.I. 849, 618 F.3d 232, 260 Ed. Law Rep. 551 (3d Cir. 2010).
- University ordinance overbroad**
- Wis.—*Board of Regents-UW System v. Decker*, 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112, 306 Ed. Law Rep. 1005 (2014).
- 10 U.S.—*Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 170 Ed. Law Rep. 83 (3d Cir. 2002).

- 11 U.S.—[Page v. Lexington County School Dist. One](#), 531 F.3d 275, 234 Ed. Law Rep. 538 (4th Cir. 2008);
[Nampa Classical Academy v. Goesling](#), 447 Fed. Appx. 776, 275 Ed. Law Rep. 625 (9th Cir. 2011).
- 12 U.S.—[Hansen v. Ann Arbor Public Schools](#), 293 F. Supp. 2d 780, 183 Ed. Law Rep. 825 (E.D. Mich. 2003).

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16B C.J.S. Constitutional Law § 1077

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

b. Facilities and Outside Speakers

§ 1077. School facilities as public or nonpublic forums for purpose of First Amendment protection

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1969, 2007

The extent to which the government can control access to a public school as a forum for speech within the protection of the First Amendment depends on the nature of the location or facility as a forum, public or nonpublic.

The First Amendment speech forum analysis applies as a means of determining when the government's interest in limiting the use of its public school property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.¹

In a school constituting a nonpublic forum opened for a limited purpose, restrictions on access can be based on subject matter so long as the distinctions drawn are reasonable in light of the purpose served by the forum and all the surrounding circumstances.² The State may reserve the use of a school as a nonpublic forum, whether by tradition or design, for its intended purposes exclusively, so long as the regulation of speech is reasonable and not an effort to suppress expression merely because of the speaker's view.³

In a school constituting a public forum, traditional or designated, content-neutral time, manner, and place restrictions on speech are permissible only if narrowly tailored to achieve a significant government interest while leaving open ample alternative channels of communication.⁴ Content-based restrictions on speech in a school constituting a public forum are subject to strict scrutiny⁵ while viewpoint-based restrictions violate First Amendment regardless of whether they also serve some valid time, place, and manner interest.⁶

Public schools are typically not public forums but may become so by designation or practice.⁷ A public school creates a designated public forum within the meaning of the First Amendment only when school authorities have by policy or practice opened those facilities for indiscriminate use by the general public.⁸ A state-funded university is not a traditional public forum under the First Amendment, and there is no requirement that a public university must make all of its facilities equally available to students and nonstudents alike or that a university must grant free access to all of its grounds or buildings.⁹

School facilities intended to be used for curricular requirements, communicative or otherwise, are not thereby made a public forum for purposes of determining the standards governing access to the school's facilities, and reasonable restrictions may be imposed.¹⁰ In classrooms, during school hours, when curricular activities are supervised by teachers, the nonpublic nature of a public school is preserved for free speech purposes.¹¹ School facilities found to constitute nonpublic forums include a public middle school cafeteria,¹² hallways in a public middle school,¹³ mailboxes assigned to public school employees,¹⁴ a walkway between a public school and a sidewalk,¹⁵ and a public school's computer system and Internet mail system.¹⁶

Public meetings at state universities are public forums,¹⁷ and a university¹⁸ or college campus is generally regarded as a public forum.¹⁹ Even so, that a university makes available a discrete location on a large campus for public discourse does not compel the conclusion that it must open all its doors for that purpose.²⁰ Apartments at a state university are not public forums.²¹

CUMULATIVE SUPPLEMENT

Cases:

Examples of nonpublic forums under the First Amendment's free speech provision include everything from a school's internal mail facilities, to a military base, to a jail. [U.S. Const. Amend. 1. American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation](#), 978 F.3d 481 (6th Cir. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Bronx Household of Faith v. Board of Educ. of City of New York](#), 650 F.3d 30 (2d Cir. 2011); [Child Evangelism Fellowship of Minnesota v. Minneapolis Special School Dist. No. 1](#), 690 F.3d 996, 283 Ed. Law Rep. 695 (8th Cir. 2012); [Bloedorn v. Grube](#), 631 F.3d 1218, 264 Ed. Law Rep. 638, 71 A.L.R.6th 767 (11th Cir. 2011).
[Cal.—San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.](#), 46 Cal. 4th 822, 95 Cal. Rptr. 3d 164, 209 P.3d 73, 245 Ed. Law Rep. 364 (2009).
[Wis.—Board of Regents-UW System v. Decker](#), 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112, 306 Ed. Law Rep. 1005 (2014).

- 2 U.S.—*Nurre v. Whitehead*, 580 F.3d 1087, 249 Ed. Law Rep. 76 (9th Cir. 2009).
N.Y.—*Macula v. Board of Educ.*, 75 A.D.3d 1118, 906 N.Y.S.2d 193, 258 Ed. Law Rep. 1222 (4th Dep't 2010).
Wash.—*Herbert v. Washington State Public Disclosure Com'n*, 136 Wash. App. 249, 148 P.3d 1102, 215 Ed. Law Rep. 185 (Div. 1 2006).
- 3 U.S.—*Doe v. South Iron R-1 School Dist.*, 498 F.3d 878, 224 Ed. Law Rep. 48 (8th Cir. 2007).
- 4 U.S.—*Justice For All v. Faulkner*, 410 F.3d 760, 198 Ed. Law Rep. 460 (5th Cir. 2005); *Bloedorn v. Grube*, 631 F.3d 1218, 264 Ed. Law Rep. 638, 71 A.L.R.6th 767 (11th Cir. 2011).
N.D.—*Riemers v. State ex rel. University of North Dakota*, 2009 ND 115, 767 N.W.2d 832, 246 Ed. Law Rep. 408 (N.D. 2009).
Wis.—*Board of Regents-UW System v. Decker*, 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112, 306 Ed. Law Rep. 1005 (2014).
- Parade restriction overly broad**
U.S.—*Knowles v. City of Waco, Tex.*, 462 F.3d 430 (5th Cir. 2006).
- 5 U.S.—*Bronx Household of Faith v. Board of Educ. of City of New York*, 650 F.3d 30 (2d Cir. 2011).
- 6 U.S.—*Child Evangelism Fellowship of Minnesota v. Minneapolis Special School Dist. No. 1*, 690 F.3d 996, 283 Ed. Law Rep. 695 (8th Cir. 2012).
Cannot deny access on religious view
U.S.—*Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352, 83 Ed. Law Rep. 30 (1993); *Child Evangelism Fellowship of Minnesota v. Minneapolis Special School Dist. No. 1*, 690 F.3d 996, 283 Ed. Law Rep. 695 (8th Cir. 2012).
District's "Best Interest" standard as viewpoint violation
U.S.—*Child Evangelism Fellowship of S.C. v. Anderson School Dist. Five*, 470 F.3d 1062, 214 Ed. Law Rep. 989 (4th Cir. 2006).
- 7 U.S.—*Nurre v. Whitehead*, 580 F.3d 1087, 249 Ed. Law Rep. 76 (9th Cir. 2009); *Bannon v. School Dist. of Palm Beach County*, 387 F.3d 1208, 193 Ed. Law Rep. 78 (11th Cir. 2004).
Cal.—*Reeves v. Rocklin Unified School Dist.*, 109 Cal. App. 4th 652, 135 Cal. Rptr. 2d 213, 177 Ed. Law Rep. 414 (3d Dist. 2003).
N.J.—*LoPresti v. Galloway Tp. Middle School*, 381 N.J. Super. 314, 885 A.2d 962, 203 Ed. Law Rep. 763 (Law Div. 2004).
- 8 U.S.—*Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Ed. Law Rep. 515 (1988); *Bloedorn v. Grube*, 631 F.3d 1218, 264 Ed. Law Rep. 638, 71 A.L.R.6th 767 (11th Cir. 2011).
Creation by intentional opening
U.S.—*Busch v. Marple Newtown School Dist.*, 567 F.3d 89, 244 Ed. Law Rep. 1023 (3d Cir. 2009), as amended, (June 5, 2009).
Public forum not created
U.S.—*Knights of Ku Klux Klan v. Bennett*, 29 F. Supp. 2d 576, 131 Ed. Law Rep. 755 (E.D. Mo. 1998), aff'd, 203 F.3d 1085, 141 Ed. Law Rep. 1001 (8th Cir. 2000).
- 9 U.S.—*Bloedorn v. Grube*, 631 F.3d 1218, 264 Ed. Law Rep. 638, 71 A.L.R.6th 767 (11th Cir. 2011).
- 10 U.S.—*Ward v. Members of Bd. of Control of Eastern Michigan University*, 700 F. Supp. 2d 803, 258 Ed. Law Rep. 269 (E.D. Mich. 2010).
As to the school's discretion to control curriculum, generally, see § 1080.
- 11 U.S.—*Busch v. Marple Newtown School Dist.*, 567 F.3d 89, 244 Ed. Law Rep. 1023 (3d Cir. 2009), as amended on other grounds, (June 5, 2009).
- 12 N.J.—*LoPresti v. Galloway Tp. Middle School*, 381 N.J. Super. 314, 885 A.2d 962, 203 Ed. Law Rep. 763 (Law Div. 2004).
- 13 U.S.—*M.A.L. ex rel. M.L. v. Kinsland*, 543 F.3d 841, 237 Ed. Law Rep. 587 (6th Cir. 2008).
- 14 Cal.—*San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.*, 46 Cal. 4th 822, 95 Cal. Rptr. 3d 164, 209 P.3d 73, 245 Ed. Law Rep. 364 (2009).
- 15 Or.—*State v. Carr*, 215 Or. App. 306, 170 P.3d 563 (2007).
- 16 Wash.—*Herbert v. Washington State Public Disclosure Com'n*, 136 Wash. App. 249, 148 P.3d 1102, 215 Ed. Law Rep. 185 (Div. 1 2006).

- 17 Wis.—Board of Regents-UW System v. Decker, 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112, 306 Ed. Law Rep. 1005 (2014).
- 18 Tex.—Spingola v. State, 135 S.W.3d 330 (Tex. App. Houston 14th Dist. 2004).
Outdoor campus areas as designated forums
U.S.—Justice For All v. Faulkner, 410 F.3d 760, 198 Ed. Law Rep. 460 (5th Cir. 2005).
Outdoor campus area as limited forum
U.S.—American Civil Liberties Union v. Mote, 423 F.3d 438, 201 Ed. Law Rep. 856 (4th Cir. 2005).
- 19 Cal.—O'Toole v. Superior Court, 140 Cal. App. 4th 488, 44 Cal. Rptr. 3d 531, 209 Ed. Law Rep. 800 (4th Dist. 2006).
- 20 U.S.—Bloedorn v. Grube, 631 F.3d 1218, 264 Ed. Law Rep. 638, 71 A.L.R.6th 767 (11th Cir. 2011).
- 21 N.D.—Riemers v. State ex rel. University of North Dakota, 2009 ND 115, 767 N.W.2d 832, 246 Ed. Law Rep. 408 (N.D. 2009).

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16B C.J.S. Constitutional Law § 1078

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

b. Facilities and Outside Speakers

§ 1078. First Amendment restrictions on outside speakers invited or approved by public education institution

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1970, 2008

The exercise of free speech within the First Amendment is subject to reasonable, narrowly tailored restraint or regulation by public schools, colleges, or universities regarding the invitation or permitting of outside speakers.

The exercise of free speech within the First Amendment by invited or approved outside speakers on school premises is subject to reasonable restraint or regulation by public schools,¹ colleges, or universities.²

When a public school invites speech, it may require that the solicited speech respond to the subject matter at hand consistent with the school's curriculum decisions,³ and thus, school officials may limit the content of a guest lecturer's speech to high school students as long as the limitations are reasonably related to legitimate pedagogical concerns.⁴ An elementary school's restriction of an effort to read Bible passages aloud to students did not violate the First Amendment rights of a student's mother who undertook the make the reading to a kindergarten class as part of a curricular "show and tell" activity.⁵ School administrators

could exercise authority over the expressive activities of a guest lecturer to a 10th-grade class when the lecture was more in the nature of curriculum than library resources, took place in a traditional classroom setting, was designed to impart particular knowledge to the student participants, and members of the public might reasonably perceive it to bear the imprimatur of the school.⁶

When the school requires that those who desire to invite a speaker secure prior official approval, the requirement, as a prior restraint on protected expression, must be narrowly tailored to serve a significant government interest, leave open alternatives for communication, not delegate overly broad discretion to official decision-makers,⁷ and not be vague or overbroad.⁸

A federal statute requiring law schools to offer military recruiters the same access to a campus and students as provided to nonmilitary recruiters as a condition of federal funding does not implicate the First Amendment protections of the school's speech since the statute does not dictate the content of speech and compels speech only to the same extent provided to other recruiters.⁹

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Footnotes

- 1 U.S.—[Busch v. Marple Newtown School Dist.](#), 567 F.3d 89, 244 Ed. Law Rep. 1023 (3d Cir. 2009), as amended on other grounds, (June 5, 2009); [Carpenter v. Dillon Elementary School Dist.](#) 10, 149 Fed. Appx. 645, 203 Ed. Law Rep. 527 (9th Cir. 2005).
- 2 U.S.—[Gilles v. Miller](#), 501 F. Supp. 2d 939, 224 Ed. Law Rep. 96 (W.D. Ky. 2007).
A.L.R. Library
Validity, under Federal Constitution, of regulation for off-campus speakers at state colleges and universities—federal cases, 5 A.L.R. Fed. 841.
- 3 U.S.—[Busch v. Marple Newtown School Dist.](#), 567 F.3d 89, 244 Ed. Law Rep. 1023 (3d Cir. 2009), as amended on other grounds, (June 5, 2009).
- 4 U.S.—[Silano v. Sag Harbor Union Free School Dist. Bd. of Educ.](#), 42 F.3d 719, 96 Ed. Law Rep. 377 (2d Cir. 1994).
- 5 U.S.—[Busch v. Marple Newtown School Dist.](#), 567 F.3d 89, 244 Ed. Law Rep. 1023 (3d Cir. 2009), as amended, (June 5, 2009).
- 6 U.S.—[Silano v. Sag Harbor Union Free School Dist. Bd. of Educ.](#), 42 F.3d 719, 96 Ed. Law Rep. 377 (2d Cir. 1994).
- 7 U.S.—[McGlone v. Bell](#), 681 F.3d 718, 280 Ed. Law Rep. 607 (6th Cir. 2012).
- 8 U.S.—[McGlone v. Cheek](#), 534 Fed. Appx. 293, 299 Ed. Law Rep. 389 (6th Cir. 2013).
- 9 U.S.—[Rumsfeld v. Forum for Academic and Institutional Rights, Inc.](#), 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156, 206 Ed. Law Rep. 819 (2006).

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16B C.J.S. Constitutional Law § 1079

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

b. Facilities and Outside Speakers

§ 1079. First Amendment right to distribute on public school premises

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1972

The reasonable regulation of the distribution of publications on the premises of public schools is permissible under the First Amendment guaranty of free speech provided the regulation is content-neutral or viewpoint-neutral.

Under the First Amendment, the reasonable regulation of the distribution of publications on school premises is permissible,¹ including a facially content-neutral requirement for the submission of proposed material to the school for prior approval,² as under standards applicable to policies rendering the school premises a limited public forum for the purposes of the distribution of literature.³ The test is one for a reasonable restriction on the time, place, and manner of distribution of nonschool material or speech under a forum analysis.⁴ Having established a limited public forum for the purposes of the dissemination of information on school premises, the school can make reasonable, viewpoint-neutral rules governing content and enforce reasonable time, place, and manner restrictions with respect to written materials.⁵

A school distribution policy may validly apply to restrict the distribution of Bibles on school premises⁶ but school policy may not restrict the distribution of materials to only those organizations identified as "patriotic organizations" under federal law.⁷

The distribution of literature which endangers the health and safety of students may be summarily halted.⁸

Placement of newsstands.

The discretion of a university's dean of students to designate areas for newsstands does not violate the First Amendment if once the areas are designated, any newspaper can place its stand in the area without further approval from the dean, giving the dean no opportunity to discriminate among different publications.⁹

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Footnotes

- 1 U.S.—M.A.L. ex rel. M.L. v. Kinsland, 543 F.3d 841, 237 Ed. Law Rep. 587 (6th Cir. 2008); Roark v. South Iron R-1 School Dist., 573 F.3d 556, 246 Ed. Law Rep. 723 (8th Cir. 2009).
- 2 U.S.—M.A.L. ex rel. M.L. v. Kinsland, 543 F.3d 841, 237 Ed. Law Rep. 587 (6th Cir. 2008); Krestan v. Deer Valley Unified School District No. 97, of Maricopa County, 561 F. Supp. 2d 1078, 235 Ed. Law Rep. 361 (D. Ariz. 2008).
- 3 U.S.—Roark v. South Iron R-1 School Dist., 573 F.3d 556, 246 Ed. Law Rep. 723 (8th Cir. 2009).
- 4 U.S.—M.A.L. ex rel. M.L. v. Kinsland, 543 F.3d 841, 237 Ed. Law Rep. 587 (6th Cir. 2008); Krestan v. Deer Valley Unified School District No. 97, of Maricopa County, 561 F. Supp. 2d 1078, 235 Ed. Law Rep. 361 (D. Ariz. 2008); M.B. ex rel. Martin v. Liverpool Central School Dist., 487 F. Supp. 2d 117, 221 Ed. Law Rep. 79 (N.D. N.Y. 2007).
- 5 U.S.—M.B. ex rel. Martin v. Liverpool Central School Dist., 487 F. Supp. 2d 117, 221 Ed. Law Rep. 79 (N.D. N.Y. 2007).
- 6 U.S.—Roark v. South Iron R-1 School Dist., 573 F.3d 556, 246 Ed. Law Rep. 723 (8th Cir. 2009); Doe v. South Iron R-1 School Dist., 498 F.3d 878, 224 Ed. Law Rep. 48 (8th Cir. 2007).
- 7 U.S.—Child Evangelism Fellowship of Minnesota v. Elk River Area School Dist. #728, 599 F. Supp. 2d 1136, 242 Ed. Law Rep. 802 (D. Minn. 2009).
- 8 U.S.—Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980).
- 9 U.S.—Hays County Guardian v. Supple, 969 F.2d 111, 76 Ed. Law Rep. 355 (5th Cir. 1992).

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16B C.J.S. Constitutional Law § 1080

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

c. Curriculum and Libraries

§ 1080. First Amendment protection of public school curriculum

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1974, 1983, 2005

A public school's curriculum, including books, texts, and content, while within the protection of the First Amendment guaranty of free speech and press, remains within the reasonable control and broad discretion of the school administration as reasonably related to legitimate pedagogical concerns.

A public school's curriculum, while within the protection of the First Amendment guaranty of free speech and press, remains within the reasonable control and broad discretion of the school administration,¹ including the school lessons,² and textbooks,³ as long as the school's actions are reasonably related to legitimate pedagogical concerns⁴ as may include considerations going to the maturity and impressionable nature of the students to whom the curriculum is directed.⁵

The curriculum taught in public schools is government speech, meaning that First Amendment rights are limited.⁶ A school's curriculum decisions should receive the judicial deference due to a genuinely academic judgment based on legitimate curriculum requirements and relatively consistent with accepted academic norms.⁷

The State may validly provide an advisory curriculum guide to public schools, constituting an element of the school curriculum over which the school may exercise curricular discretion, without constituting the curriculum as a virtual school library subject to a First Amendment review for the right of access to ideas.⁸

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Footnotes

- 1 U.S.—*Morgan v. Swanson*, 659 F.3d 359, 273 Ed. Law Rep. 524 (5th Cir. 2011); *Chiras v. Miller*, 432 F.3d 606, 205 Ed. Law Rep. 32 (5th Cir. 2005); *Ward v. Polite*, 667 F.3d 727, 276 Ed. Law Rep. 593 (6th Cir. 2012).
A.L.R. Library
Propriety, under First Amendment, of school board's censorship of public school libraries or coursebooks, 64 A.L.R. Fed. 771.
Validity, under Federal Constitution, of public school or state college regulation of student newspapers, magazines, or other publications—federal cases, 16 A.L.R. Fed. 182.
- 2 U.S.—*Ward v. Polite*, 667 F.3d 727, 276 Ed. Law Rep. 593 (6th Cir. 2012).
- 3 U.S.—*Chiras v. Miller*, 432 F.3d 606, 205 Ed. Law Rep. 32 (5th Cir. 2005); *Kirby v. Yonkers School Dist.*, 767 F. Supp. 2d 452, 267 Ed. Law Rep. 675 (S.D. N.Y. 2011).
- 4 U.S.—*Cox v. Warwick Valley Cent. School Dist.*, 654 F.3d 267, 272 Ed. Law Rep. 159 (2d Cir. 2011); *Busch v. Marple Newtown School Dist.*, 567 F.3d 89, 244 Ed. Law Rep. 1023 (3d Cir. 2009), as amended on other grounds, (June 5, 2009); *Morgan v. Swanson*, 659 F.3d 359, 273 Ed. Law Rep. 524 (5th Cir. 2011); *Esquivel v. San Francisco Unified School Dist.*, 630 F. Supp. 2d 1055, 247 Ed. Law Rep. 699 (N.D. Cal. 2008); *Kramer v. New York City Bd. of Educ.*, 715 F. Supp. 2d 335, 261 Ed. Law Rep. 152 (E.D. N.Y. 2010).
- 5 U.S.—*Busch v. Marple Newtown School Dist.*, 567 F.3d 89, 244 Ed. Law Rep. 1023 (3d Cir. 2009), as amended on other grounds, (June 5, 2009); *Kirby v. Yonkers School Dist.*, 767 F. Supp. 2d 452, 267 Ed. Law Rep. 675 (S.D. N.Y. 2011).
Consider sophistication of the students
U.S.—*Kramer v. New York City Bd. of Educ.*, 715 F. Supp. 2d 335, 261 Ed. Law Rep. 152 (E.D. N.Y. 2010).
- 6 U.S.—*Chiras v. Miller*, 432 F.3d 606, 205 Ed. Law Rep. 32 (5th Cir. 2005); *Esquivel v. San Francisco Unified School Dist.*, 630 F. Supp. 2d 1055, 247 Ed. Law Rep. 699 (N.D. Cal. 2008); *Nampa Classical Academy v. Goesling*, 714 F. Supp. 2d 1079, 260 Ed. Law Rep. 799 (D. Idaho 2010), *aff'd*, 447 Fed. Appx. 776, 275 Ed. Law Rep. 625 (9th Cir. 2011); *Griswold v. Driscoll*, 625 F. Supp. 2d 49, 247 Ed. Law Rep. 44 (D. Mass. 2009), *aff'd* on other grounds, 616 F.3d 53, 260 Ed. Law Rep. 38 (1st Cir. 2010).
- 7 U.S.—*Ward v. Members of Bd. of Control of Eastern Michigan University*, 700 F. Supp. 2d 803, 258 Ed. Law Rep. 269 (E.D. Mich. 2010).
- 8 U.S.—*Griswold v. Driscoll*, 616 F.3d 53, 260 Ed. Law Rep. 38 (1st Cir. 2010).

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16B C.J.S. Constitutional Law § 1081

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

c. Curriculum and Libraries

§ 1081. First Amendment protection of public school libraries

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1974, 1983, 2005

The control of a school library, and the selection, removal, or exclusion of books or other content, is subject to heightened First Amendment scrutiny and limitations on the exercise of school discretion, distinct from the school's broad control over curriculum.

The special characteristics of a public school library make that environment especially appropriate for the recognition of First Amendment rights, and while school authorities have significant discretion with respect to choosing the content of school libraries, that discretion may not be exercised in a narrowly partisan or political manner.¹ The exclusion of religious books or texts is permissible as there is no First Amendment right to use the Bible or other religious texts as part of a public school curriculum.²

The standard of discretion afforded public schools in the selection of school curriculum does not apply to a school's decision to remove a book from a school library apart from the school's regular curriculum; a higher level of constitutional scrutiny applies.³ The distinguishing factor between library resources and school curriculum for this purpose is that library resources

may be voluntarily withdrawn and used at leisure while curriculum is required.⁴ The right of public school students to receive information and ideas is infringed when school authorities selectively remove books from school libraries because the school authorities disagree with the content of the books representing constitutionally protected ideas.⁵ Schools may not remove books from the school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what is orthodox in politics, nationalism, religion, or other matters of opinion.⁶ A selective removal of books may be justified if it is based on the determination of the authorities that the works in question are vulgar and indecent or that they are educationally unsuitable.⁷ For this purpose, factual accuracy is one test for the removal of nonfiction books as educationally unsuitable.⁸

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Footnotes

- 1 U.S.—Board of Educ., *Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435, 4 Ed. Law Rep. 1013 (1982); *Chiras v. Miller*, 432 F.3d 606, 205 Ed. Law Rep. 32 (5th Cir. 2005).
- 2 U.S.—*Nampa Classical Academy v. Goesling*, 714 F. Supp. 2d 1079, 260 Ed. Law Rep. 799 (D. Idaho 2010), *aff'd*, 447 Fed. Appx. 776, 275 Ed. Law Rep. 625 (9th Cir. 2011).
- 3 U.S.—*Campbell v. St. Tammany Parish School Bd.*, 64 F.3d 184, 103 Ed. Law Rep. 41 (5th Cir. 1995).
- 4 U.S.—*Silano v. Sag Harbor Union Free School Dist. Bd. of Educ.*, 42 F.3d 719, 96 Ed. Law Rep. 377 (2d Cir. 1994).
- 5 U.S.—Board of Educ., *Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435, 4 Ed. Law Rep. 1013 (1982).
- 6 U.S.—Board of Educ., *Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435, 4 Ed. Law Rep. 1013 (1982).
- 7 U.S.—Board of Educ., *Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435, 4 Ed. Law Rep. 1013 (1982).
- 8 U.S.—*American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Bd.*, 557 F.3d 1177, 242 Ed. Law Rep. 519 (11th Cir. 2009).

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16B C.J.S. Constitutional Law § 1082

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

d. Teachers or Faculty

(1) General Principles

§ 1082. General right of public school teacher's protected speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1989 to 1999

The teachers and faculty of public schools, colleges, and universities retain their First Amendment right to free speech and press in schools, subject to limitations by their status as public employees.

Public school teachers,¹ and teachers in public colleges and universities, have First Amendment rights to free speech and press as other citizens.² Teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.³ Nonetheless, the free expression of school teachers in class is subject to the freedom of an educational institution to choose who may teach, what may be taught, how it will be taught, and who may be admitted to study.⁴

Teachers are public employees and, as such, their free speech rights are generally subject to the public employee test of speech on matters of public concern, in effect rendering their qualifying speech protected "citizen speech" in regard to employer restriction

or retaliation,⁵ but a forum analysis is properly applied to determine the standards for claimed rights of expression by teachers using school facilities.⁶

Curricular speech and academic expression.

Curricular speech is not generally protected as public concern speech,⁷ but academic expression is generally excepted from the requirement that public employee speech not relate to the duties or responsibilities of the employment.⁸

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Footnotes

- 1 U.S.—*Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist.*, 624 F.3d 332, 261 Ed. Law Rep. 904 (6th Cir. 2010); *Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 273 Ed. Law Rep. 110 (9th Cir. 2011).
- 2 U.S.—*Shaw v. Board of Trustees of Frederick Community College*, 549 F.2d 929 (4th Cir. 1976).
- 3 U.S.—*Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist.*, 624 F.3d 332, 261 Ed. Law Rep. 904 (6th Cir. 2010).
A.L.R. Library
Application of First Amendment in School Context—Supreme Court Cases, 57 A.L.R. Fed. 2d 1.
- 4 U.S.—*Borden v. School Dist. of Tp. of East Brunswick*, 523 F.3d 153, 231 Ed. Law Rep. 583 (3d Cir. 2008).
- 5 §§ 1084 to 1086.
- 6 § 1083.
- 7 § 1088.
- 8 § 1087.

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

d. Teachers or Faculty

(1) General Principles

§ 1083. Public forum standards applicable to First Amendment protection of public school teacher's speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1989

The teachers and faculty of public schools, colleges, and universities retain their First Amendment right to free speech when using school premises or facilities, subject to limitations permissible under a public forum analysis.

A public forum based analysis for the standards of First Amendment free speech applicable to speech by nonemployees in a particular location or using particular facilities¹ does not apply to the government's regulation or restriction of teacher speech as a public employer,² which is subject exclusively to a public employee analysis,³ but a forum analysis is properly applied to determine the standards applicable to claimed rights of expression by teachers using school facilities or premises.⁴ Depending on the level of scrutiny required by the particular forum determination, as public or nonpublic, content-neutral limitations may apply if narrowly tailored and reasonable for time, place, and manner of speech, allowing alternative channels for speech.⁵ In

the absence of acts or policies by the school creating a public forum in school facilities, restrictions on teachers' speech by use of the facilities need only be reasonable.⁶

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Footnotes

- 1 § 1077.
- 2 U.S.—*Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 273 Ed. Law Rep. 110 (9th Cir. 2011).
- 3 §§ 1084 to 1086.
- 4 U.S.—*Williams v. Vidmar*, 367 F. Supp. 2d 1265, 198 Ed. Law Rep. 292 (N.D. Cal. 2005); *Policastro v. Tenaflly Bd. of Educ.*, 710 F. Supp. 2d 495, 260 Ed. Law Rep. 129 (D.N.J. 2010), *aff'd*, 438 Fed. Appx. 153 (3d Cir. 2011).
Wash.—*Herbert v. Washington State Public Disclosure Com'n*, 136 Wash. App. 249, 148 P.3d 1102, 215 Ed. Law Rep. 185 (Div. 1 2006).
Bulletin boards not public forums
U.S.—*Lee v. York County School Div.*, 418 F. Supp. 2d 816 (E.D. Va. 2006), *aff'd*, 484 F.3d 687, 219 Ed. Law Rep. 413 (4th Cir. 2007).
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Application of First Amendment in School Context—Supreme Court Cases, 57 A.L.R. Fed. 2d 1.
- 5 U.S.—*Policastro v. Tenaflly Bd. of Educ.*, 710 F. Supp. 2d 495, 260 Ed. Law Rep. 129 (D.N.J. 2010), *aff'd*, 438 Fed. Appx. 153 (3d Cir. 2011).
- 6 U.S.—*Williams v. Vidmar*, 367 F. Supp. 2d 1265, 198 Ed. Law Rep. 292 (N.D. Cal. 2005).

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16B C.J.S. Constitutional Law § 1084

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

d. Teachers or Faculty

(1) General Principles

§ 1084. Public employee standards applicable to First Amendment protection of public school teacher's speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1989 to 1999, 2019

The teachers and faculty of public schools, colleges, and universities, as public employees, retain their First Amendment right to free speech as private citizens in schools when speaking on matters of public concern and not solely in the performance of their official employment duties, subject to a balancing of interests between the employer and the employee.

Teachers in public schools, colleges, or universities, like other government employees, do not relinquish the First Amendment free speech rights they would otherwise enjoy as citizens to comment on matters of public interest, subject to a balancing of the teacher's interests, as a citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public school services it performs through its employees.¹

A two-step inquiry is used to determine whether the speech of a school teacher, as a public employee, is protected under the First Amendment from retaliatory employer action: the first requires determining whether the employee spoke as a citizen on a matter of public concern,² addressing a matter of political, social, or other concern to the community at large, as opposed to a purely personal interest.³ If the answer is no—that a matter of public concern is not involved—the teacher-employee is without a First Amendment cause of action based on the employer's reaction to the speech,⁴ but if the answer is yes—that a matter of public concern is involved—then the possibility of a First Amendment claim arises⁵ and the question becomes whether the relevant government employer had an adequate justification for treating the employee differently from any other member of the general public.⁶

In evaluating whether the speech of a public school teacher or professor is a matter of public concern, if the teacher or professor speaks or writes about what is properly viewed as essentially a private grievance, the First Amendment does not provide protection from any adverse employment reaction.⁷ Personnel grievances or complaints generally lack the necessary citizen analogue for protection⁸ even in the context of reporting misconduct by supervisory personnel.⁹ A teacher's speech involving complaints to supervisors about teaching conditions is not protected public concern speech unless directed to the general public.¹⁰ Teachers' public speech to the school board regarding the renewal of the school charter and upcoming school elections is a matter of public concern subject to protection from retaliatory action, but the public concern protection does not extend to the teachers' speech regarding staffing, compensation, and general internal management matters.¹¹

A university professor's speech on a matter of public concern when given in a public manner, as in books, columns, and commentaries addressed to a national and international audience—addressing topics of academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality—is not transformed into unprotected speech when it is submitted to the university in connection with an application for promotion.¹²

A teacher's expressive conduct made in the course of working for a candidate's political campaign would constitute protected speech under the First Amendment, even if the candidate lost and the campaign therefore ceased being a matter of immediate public concern, or if the teacher moved to an area where the candidate was not on the ballot.¹³

Curricular speech.

Curricular speech is not generally protected as public concern speech.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Under the *Pickering* framework for determining whether a public-school teacher's speech is protected by the First Amendment, the court first asks whether the teacher was speaking on a matter of public concern, and then asks whether the teacher's interest in doing so is greater than the school's interest in promoting the efficiency of the public services it performs through the teacher. [U.S. Const. Amend. 1. Meriwether v. Hartop, 992 F.3d 492 \(6th Cir. 2021\).](#)

It was not clearly established that it would violate a public employee's free speech rights to take adverse action because her father had engaged in protected speech, at time when public school teacher was allegedly denied promotion based on public criticism of superintendent made by her father, who was county commissioner, and thus superintendent was entitled to qualified immunity from teacher's § 1983 freedom of speech claim; United States Supreme Court case holding that an employee could pursue Title VII retaliation claim after he was allegedly fired because his fiancé, who was coworker, had engaged in protected

activity did not constitute clearly established First Amendment law, given that Title VII protections were not always same as those provided by federal Constitution. [U.S. Const. Amend. 1](#); [42 U.S.C.A. § 1983](#); Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#) [Gaines v. Wardynski](#), 871 F.3d 1203 (11th Cir. 2017).

Retaliation provision in university's policy and procedures, under which university professor was reprimanded for making remarks concerning faculty member's son's suicide, was not void for being overbroad in action brought by professor against university and university employees after university conducted an investigation into inflammatory statements made by professor; the retaliation provisions were not written more broadly than needed to proscribe illegitimate and unprotected conduct, and specifically provided that it does not apply to speech or conduct protected by the First Amendment. [U.S. Const. Amend. 1](#). [Board of Trustees of Purdue University v. Eisenstein](#), 87 N.E.3d 481, 350 Ed. Law Rep. 367 (Ind. Ct. App. 2017), transfer denied, 2018 WL 882434 (Ind. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Borden v. School Dist. of Tp. of East Brunswick](#), 523 F.3d 153, 231 Ed. Law Rep. 583 (3d Cir. 2008); [Demers v. Austin](#), 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014); [Mpoy v. Rhee](#), 758 F.3d 285, 307 Ed. Law Rep. 627 (D.C. Cir. 2014).
As to a public employee speech analysis, generally, see [§§ 1059 et seq.](#)
As to the balancing of interests in the public school context, see [§ 1086](#).
As to the test of official duties or responsibilities in the public school context, see [§ 1085](#).
A.L.R. Library
[Application of First Amendment in School Context—Supreme Court Cases](#), 57 A.L.R. Fed. 2d 1.
- 2 [U.S.—Adams v. Trustees of the University of N.C.-Wilmington](#), 640 F.3d 550, 267 Ed. Law Rep. 501 (4th Cir. 2011); [Demers v. Austin](#), 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014); [Mpoy v. Rhee](#), 758 F.3d 285, 307 Ed. Law Rep. 627 (D.C. Cir. 2014).
[Colo.—Churchill v. University of Colorado at Boulder](#), 293 P.3d 16, 288 Ed. Law Rep. 886 (Colo. App. 2010), [aff'd on other grounds](#), 2012 CO 54, 285 P.3d 986, 284 Ed. Law Rep. 540 (Colo. 2012), cert. denied, 133 S. Ct. 1724, 185 L. Ed. 2d 785, 291 Ed. Law Rep. 562 (2013).
[Mo.—Loeffelman v. Board of Educ. of Crystal City School Dist.](#), 134 S.W.3d 637, 188 Ed. Law Rep. 510 (Mo. Ct. App. E.D. 2004).
- 3 [U.S.—Demers v. Austin](#), 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014).
[Mo.—Loeffelman v. Board of Educ. of Crystal City School Dist.](#), 134 S.W.3d 637, 188 Ed. Law Rep. 510 (Mo. Ct. App. E.D. 2004).
- 4 [U.S.—Nagle v. Marron](#), 663 F.3d 100, 274 Ed. Law Rep. 382 (2d Cir. 2011); [Wingate v. Gage County School Dist., No. 34](#), 528 F.3d 1074, 233 Ed. Law Rep. 524 (8th Cir. 2008).
- 5 [U.S.—Adams v. Trustees of the University of N.C.-Wilmington](#), 640 F.3d 550, 267 Ed. Law Rep. 501 (4th Cir. 2011); [Brammer-Hoelter v. Twin Peaks Charter Academy](#), 492 F.3d 1192, 222 Ed. Law Rep. 596 (10th Cir. 2007).
- 6 [U.S.—Mpoy v. Rhee](#), 758 F.3d 285, 307 Ed. Law Rep. 627 (D.C. Cir. 2014).
- 7 [U.S.—Demers v. Austin](#), 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014).
- 8 [U.S.—Wingate v. Gage County School Dist., No. 34](#), 528 F.3d 1074, 233 Ed. Law Rep. 524 (8th Cir. 2008); [Mpoy v. Rhee](#), 758 F.3d 285, 307 Ed. Law Rep. 627 (D.C. Cir. 2014); [Isenalumhe v. McDuffie](#), 697 F. Supp. 2d 367, 257 Ed. Law Rep. 939 (E.D. N.Y. 2010).
- 9 [U.S.—Nagle v. Marron](#), 663 F.3d 100, 274 Ed. Law Rep. 382 (2d Cir. 2011).
- 10 [U.S.—Fox v. Traverse City Area Public Schools Bd. of Educ.](#), 605 F.3d 345, 257 Ed. Law Rep. 23 (6th Cir. 2010).
- 11 [U.S.—Brammer-Hoelter v. Twin Peaks Charter Academy](#), 492 F.3d 1192, 222 Ed. Law Rep. 596 (10th Cir. 2007).

12 U.S.—Adams v. Trustees of the University of N.C.-Wilmington, 640 F.3d 550, 267 Ed. Law Rep. 501 (4th
Cir. 2011).
13 U.S.—Nagle v. Marron, 663 F.3d 100, 274 Ed. Law Rep. 382 (2d Cir. 2011).
14 § 1088.

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

d. Teachers or Faculty

(1) General Principles

§ 1085. Public employee standards applicable to First Amendment protection of public school teacher's speech—Official duties or responsibilities

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1989 to 1999, 2019

The teachers and faculty of public schools, colleges, and universities, as public employees, retain their First Amendment right to free speech as private citizens in schools when speaking on matters of public concern provided their speech is not solely in the performance of their official employment duties.

Regardless whether the speech of teachers and faculty of public schools, colleges, and universities involves a matter of public concern, as may qualify the speech for First Amendment protection as private citizen speech,¹ if it is undertaken in the course of official duties or job responsibilities, the speech is not private citizen speech, and the First Amendment does not afford protection against retaliatory employer action.² However, teachers speaking publicly outside the course of performing their official duties retain some possibility of First Amendment protection when the activity is of a kind in which private citizens engage.³

Speech in the classroom in the conduct of a prescribed course of study is speech in the teacher's employment and not private citizen speech, even if the subject of the speech is a matter of inherent public concern, such as the teacher's personal views on the role of God in the nation's history.⁴

A teacher's speech owing its existence to the teacher's professional responsibilities, whether those responsibilities are ad hoc or de facto and absent from a formal job description, are unprotected job speech, including complaints to supervisors about teaching conditions that relate solely to the conditions of the teacher's employment.⁵ In contrast, formal complaints filed with an outside board or commission, and filed as a private citizen instead of as a school employee, are protected speech, particularly when the terms of the speaker's employment do not involve the compliance issues voiced in the complaint and the employment imposes no duty to make such a complaint.⁶ Teachers' public speech to the school board regarding the need to improve school performance is subject to protection from retaliatory action when made outside the teachers' normal duties, outside normal school hours, and outside the school premises.⁷

A university professor's speech, otherwise constituting speech on matters of public concern, is not unprotected as speech in the performance of assigned duties or terms of employment when none of the speech is undertaken at the direction of the university, paid for by university, or has any direct application to the professor's university duties.⁸

A tenured professor's speech to assist and support a student charged with violating the university's policy against weapons possession was made within the professor's official duties, and thus did not support a claim alleging retaliation, since the professor was de facto advisor to all students with disciplinary problems and professor used university resources in doing so.⁹

Academic expression.

Academic expression is generally excepted from the requirement that speech not relate to the duties or responsibilities of the employment.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Public university associate professor's speech, challenging the initiation of proceedings to terminate his tenure and employment, did not involve matter of public concern, as required for his speech to be protected under the First Amendment; allegations in the complaint did not provide specific content of the speech, and without more detail that would suggest broader public concerns, employee seemed to allege only the type of speech that fell in realm of an internal employee dispute. [U.S. Const. Amend. 1. Ryan v. Blackwell, 979 F.3d 519 \(6th Cir. 2020\).](#)

University's failure to appeal denial of O-1 "extraordinary person" visa for assistant professor who was Egyptian national did not adversely impact professor's status, as required to support claim that university retaliated against professor, in violation of Missouri Human Rights Act (MHRA), after professor complained that unfavorable faculty evaluation was due to discrimination based on race, religion, and national origin, absent any showing that appeal would have been successful, given that such visas were reserved for aliens who possessed "extraordinary ability in the sciences, arts, [or] education ... which has been demonstrated by sustained national or international acclaim ... and whose achievements have been recognized in the field through extensive documentation," professor was just beginning her professional career, and there was no evidence that she had become preeminent expert in her field of early childhood education, creativity, and innovation, or that she had received major internationally recognized award or had accomplished at least three "lesser" enumerated achievements under regulations governing such visa. Immigration and Nationality Act § 101, [8 U.S.C.A. § 1101\(a\)\(15\)\(O\)\(i\)](#); [8 C.F.R. § 204.5\(h\)\(3\)\(i\)-\(x\)](#); [Mo. Ann. Stat. § 213.070.1. Kader v. Board of Regents of Harris-Stowe State University, 565 S.W.3d 182 \(Mo. 2019\).](#)

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Footnotes

- 1 § 1084.
- 2 U.S.—*Nagle v. Marron*, 663 F.3d 100, 274 Ed. Law Rep. 382 (2d Cir. 2011);
 Gorum v. Sessoms, 561 F.3d 179, 242 Ed. Law Rep. 679 (3d Cir. 2009); *Fox v. Traverse City Area Public*
 Schools Bd. of Educ., 605 F.3d 345, 257 Ed. Law Rep. 23 (6th Cir. 2010); *Johnson v. Poway Unified School*
 Dist., 658 F.3d 954, 273 Ed. Law Rep. 110 (9th Cir. 2011); *Leon v. Department of Educ.*, 16 F. Supp. 3d
 184, 310 Ed. Law Rep. 241 (E.D. N.Y. 2014).
 Colo.—*Churchill v. University of Colorado at Boulder*, 293 P.3d 16, 288 Ed. Law Rep. 886 (Colo. App.
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- 3 U.S.—*Reinhardt v. Albuquerque Public Schools Bd. of Educ.*, 595 F.3d 1126, 253 Ed. Law Rep. 567 (10th
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- 4 U.S.—*Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 273 Ed. Law Rep. 110 (9th Cir. 2011).
- 5 U.S.—*Fox v. Traverse City Area Public Schools Bd. of Educ.*, 605 F.3d 345, 257 Ed. Law Rep. 23 (6th
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- 6 U.S.—*Reinhardt v. Albuquerque Public Schools Bd. of Educ.*, 595 F.3d 1126, 253 Ed. Law Rep. 567 (10th
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- 7 U.S.—*Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 222 Ed. Law Rep. 596 (10th Cir.
 2007).
- 8 U.S.—*Adams v. Trustees of the University of N.C.-Wilmington*, 640 F.3d 550, 267 Ed. Law Rep. 501 (4th
 Cir. 2011).
- 9 U.S.—*Gorum v. Sessoms*, 561 F.3d 179, 242 Ed. Law Rep. 679 (3d Cir. 2009).
- 10 § 1087.

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

d. Teachers or Faculty

(1) General Principles

§ 1086. Public employee standards applicable to First Amendment protection of public school teacher's speech—Balancing of interests

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1989 to 1999, 2019

The teachers and faculty of public schools, colleges, and universities, as public employees, retain their First Amendment right to free speech as private citizens in schools when speaking on matters of public concern provided the balancing of interests between the employer and the employee favors the protection of the employee's particular speech.

Regardless whether the speech of teachers and faculty of public schools, colleges, and universities involves a matter of public concern, as may qualify the speech for First Amendment protection as private citizen speech,¹ it must appear that a balancing of the teacher's interests, as a citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public school services it performs through its employees, favors the questioned speech.²

A state university's interest in protecting its academic integrity clearly outweighed any interest a teaching assistant had in publicly presenting fraudulent data in a scientific publication.³

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Footnotes

- 1 § 1084.
- 2 U.S.—*Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist.*, 428 F.3d 223, 203 Ed. Law Rep. 88, 2005 FED App. 0432P (6th Cir. 2005); *Demers v. Austin*, 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014); *Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 273 Ed. Law Rep. 110 (9th Cir. 2011); *Mpoy v. Rhee*, 758 F.3d 285, 307 Ed. Law Rep. 627 (D.C. Cir. 2014).
 Colo.—*Churchill v. University of Colorado at Boulder*, 293 P.3d 16, 288 Ed. Law Rep. 886 (Colo. App. 2010), *aff'd on other grounds*, 2012 CO 54, 285 P.3d 986, 284 Ed. Law Rep. 540 (Colo. 2012), *cert. denied*, 133 S. Ct. 1724, 185 L. Ed. 2d 785, 291 Ed. Law Rep. 562 (2013).
 Mo.—*Loeffelman v. Board of Educ. of Crystal City School Dist.*, 134 S.W.3d 637, 188 Ed. Law Rep. 510 (Mo. Ct. App. E.D. 2004).
- 3 U.S.—*Pugel v. Board of Trustees of University of Illinois*, 378 F.3d 659, 190 Ed. Law Rep. 760 (7th Cir. 2004).

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16B C.J.S. Constitutional Law § 1087

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

d. Teachers or Faculty

(2) Applications to Particular Types of Speech

§ 1087. First Amendment protection of public school employee academic expression

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1989, 1999, 2019

Speech that constitutes academic expression is protected speech under the First Amendment as an exception to the general rule that the speech of a teacher, as a public employee in a public school, college, or university, is not protected under the First Amendment from adverse employment action or retaliation when made in the performance of official duties or responsibilities.

Speech that constitutes academic expression is protected speech under the First Amendment,¹ and the protection afforded is an exception to the general rule that the speech of a teacher, as a public employee in a public school, college, or university, is not protected under the First Amendment from adverse employment action or retaliation when made in the performance of official duties or responsibilities.² Instead, the applicable test is whether academic speech addresses a matter of public concern, rendering it protected citizen speech.³ In addition, the question whether a public school teacher's speech in the classroom is protected also requires a determination whether the speech is curricular since curricular speech is not a matter of public concern.⁴

Teaching and academic writing are at the core of the official duties of teachers and professors and, as such, are a special concern of the First Amendment.⁵ While protected academic writing or expression is not limited to scholarship,⁶ the academic exception is inapplicable to matters unless they are academic in character and does not apply to complaints about the condition or conduct of the school.⁷

The test for speech constituting protected academic expression is essentially of the same character as the test for what constitutes protected public concern speech in that the linchpin of the inquiry is the extent to which the speech advances an idea transcending personal interest or opinion which affects the public's social and political lives.⁸ Protected academic speech is about ideas or ideological or political issues.⁹

The concept of academic freedom does not protect the use of racial slurs¹⁰ and does not apply to slanderous statements about colleagues.¹¹

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Footnotes

- 1 U.S.—*Dambrot v. Central Michigan University*, 55 F.3d 1177, 100 Ed. Law Rep. 869, 1995 FED App. 0168P (6th Cir. 1995); *Demers v. Austin*, 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014); *C.F. ex rel. Farnan v. Capistrano Unified School Dist.*, 654 F.3d 975, 272 Ed. Law Rep. 169, 80 Fed. R. Serv. 3d 486 (9th Cir. 2011); *Sadid v. Vailas*, 936 F. Supp. 2d 1207, 297 Ed. Law Rep. 253 (D. Idaho 2013); *Kerr v. Hurd*, 694 F. Supp. 2d 817, 257 Ed. Law Rep. 605 (S.D. Ohio 2010).
Idaho—*Sadid v. Idaho State University*, 154 Idaho 88, 294 P.3d 1100, 289 Ed. Law Rep. 358 (2013).
As to the relationship of curricular speech and the requirement that protected public employee speech address a matter of public concern, see § 1084.
- 2 U.S.—*Adams v. Trustees of the University of N.C.-Wilmington*, 640 F.3d 550, 267 Ed. Law Rep. 501 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014); *Sadid v. Vailas*, 936 F. Supp. 2d 1207, 297 Ed. Law Rep. 253 (D. Idaho 2013); *Kerr v. Hurd*, 694 F. Supp. 2d 817, 257 Ed. Law Rep. 605 (S.D. Ohio 2010).
- 3 U.S.—*Demers v. Austin*, 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014); *Kerr v. Hurd*, 694 F. Supp. 2d 817, 257 Ed. Law Rep. 605 (S.D. Ohio 2010).
- 4 § 1088.
- 5 U.S.—*Demers v. Austin*, 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014).
- 6 U.S.—*Demers v. Austin*, 746 F.3d 402, 303 Ed. Law Rep. 91 (9th Cir. 2014).
- 7 U.S.—*Mpoy v. Fenty*, 901 F. Supp. 2d 144, 291 Ed. Law Rep. 631 (D.D.C. 2012), judgment aff'd, 758 F.3d 285, 307 Ed. Law Rep. 627 (D.C. Cir. 2014).
- 8 U.S.—*Dambrot v. Central Michigan University*, 55 F.3d 1177, 100 Ed. Law Rep. 869, 1995 FED App. 0168P (6th Cir. 1995).
As to what constitutes speech by public school teachers on a matter of public concern, generally, see § 1084.
- 9 Idaho—*Sadid v. Idaho State University*, 154 Idaho 88, 294 P.3d 1100, 289 Ed. Law Rep. 358 (2013).
- 10 U.S.—*Dambrot v. Central Michigan University*, 55 F.3d 1177, 100 Ed. Law Rep. 869, 1995 FED App. 0168P (6th Cir. 1995).
- 11 Idaho—*Sadid v. Idaho State University*, 154 Idaho 88, 294 P.3d 1100, 289 Ed. Law Rep. 358 (2013).

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16B C.J.S. Constitutional Law § 1088

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

d. Teachers or Faculty

(2) Applications to Particular Types of Speech

§ 1088. First Amendment protection of public school employee curricular speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1989, 1999

Curricular speech in the classroom by teachers, as public employees in a public school, college, or university, is not protected under the First Amendment from adverse employment action or retaliation when made in the performance of official duties or responsibilities.

The First Amendment affords protection to academic expression, regardless whether it is in the performance of employment duties or responsibilities,¹ but public schools may limit classroom speech of teachers to curricular speech in order to promote educational goals,² at least as applied to primary and secondary education public school teachers.³ The First Amendment does not entitle primary and secondary education public school teachers to cover topics or advocate viewpoints that depart from the curriculum adopted by the school system when they are conducting the education of students as captive audiences.⁴

Thus, the question whether a public school teacher's speech in the classroom is protected as speech on a matter of public concern requires determining whether the speech is curricular since curricular speech is not a matter of public concern.⁵

When a teacher's statements in class during instructional periods are part of the curriculum, the statements are subject to reasonable regulation related to legitimate pedagogical concerns as will depend on age and sophistication of the students, the relationship between the teaching method and valid educational objective, and the context and manner of the presentation.⁶ A school need not tolerate teacher speech that is inconsistent with the school's basic educational mission even though the government could not censor similar speech outside the school.⁷

The generally applicable definition of curriculum applies for the purpose of determining whether particular speech is curricular speech, meaning speech that constitutes school sponsored expression bearing the imprimatur of the school, that is further supervised by faculty members, and that is designed to impart particular knowledge to students.⁸ Classroom speech can impart particular knowledge if its purpose is to convey a specific message or information to students, and that specific message need not relate to instruction in a particular subject, but can instead constitute information on social or moral values to which the teacher believes the students should be exposed or which the teacher believes the students should learn.⁹

In-class speech, by its location, is not removed from a presumptive place within the ambit of the First Amendment, and a showing that particular materials used by a teacher in the classroom constitute approved school curriculum is sufficient to establish that the expression is subject to First Amendment protection.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

A teacher, such as an instructor in a class on world religions, who merely provides a description of the beliefs and practices of a religion without making any effort to inculcate those beliefs could not qualify for the ministerial exception, grounded in First Amendment's Religion Clauses, to laws governing employment relationship between a religious institution and certain key employees. *U.S. Const. Amend. 1. Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 207 L. Ed. 2d 870, 378 Ed. Law Rep. 614 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 § 1087.
- 2 U.S.—*Borden v. School Dist. of Tp. of East Brunswick*, 523 F.3d 153, 231 Ed. Law Rep. 583 (3d Cir. 2008); *Lee v. York County School Div.*, 484 F.3d 687, 219 Ed. Law Rep. 413 (4th Cir. 2007); *Grossman v. South Shore Public School Dist.*, 507 F.3d 1097, 227 Ed. Law Rep. 109 (7th Cir. 2007); *Griswold v. Driscoll*, 625 F. Supp. 2d 49, 247 Ed. Law Rep. 44 (D. Mass. 2009), *aff'd* on other grounds, 616 F.3d 53, 260 Ed. Law Rep. 38 (1st Cir. 2010).
Direction to teach only assigned curriculum
 U.S.—*Smith v. Central Dauphin School Dist.*, 511 F. Supp. 2d 460 (M.D. Pa. 2007).
Reassignment for refusal to teach evolution
 Minn.—*LeVake v. Independent School Dist. No. 656*, 625 N.W.2d 502, 153 Ed. Law Rep. 356 (Minn. Ct. App. 2001).
Required to remove banned books pamphlet

U.S.—*Newton v. Slye*, 116 F. Supp. 2d 677, 148 Ed. Law Rep. 179 (W.D. Va. 2000).

3 U.S.—*Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 215 Ed. Law Rep. 626 (7th Cir. 2007); *Brown v. Chicago Board of Educ.*, 973 F. Supp. 2d 870, 303 Ed. Law Rep. 269 (N.D. Ill. 2013).

4 U.S.—*Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 215 Ed. Law Rep. 626 (7th Cir. 2007).

Applies to noncollege level teachers

U.S.—*Brown v. Chicago Board of Educ.*, 973 F. Supp. 2d 870, 303 Ed. Law Rep. 269 (N.D. Ill. 2013).

5 U.S.—*Lee v. York County School Div.*, 484 F.3d 687, 219 Ed. Law Rep. 413 (4th Cir. 2007).

6 U.S.—*Ward v. Hickey*, 996 F.2d 448, 84 Ed. Law Rep. 46 (1st Cir. 1993); *Weingarten v. Board of Educ. of City School Dist. of City of New York*, 680 F. Supp. 2d 595, 255 Ed. Law Rep. 144 (S.D. N.Y. 2010).

As to school curriculum and the First Amendment, generally, see § 1080.

7 U.S.—*Lee v. York County School Div.*, 484 F.3d 687, 219 Ed. Law Rep. 413 (4th Cir. 2007).

Expressing distain for curriculum

U.S.—*Hennessy v. City of Melrose*, 194 F.3d 237, 139 Ed. Law Rep. 124 (1st Cir. 1999).

Political expression departs from curriculum

U.S.—*Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 215 Ed. Law Rep. 626 (7th Cir. 2007).

8 U.S.—*Lee v. York County School Div.*, 484 F.3d 687, 219 Ed. Law Rep. 413 (4th Cir. 2007).

9 U.S.—*Lee v. York County School Div.*, 484 F.3d 687, 219 Ed. Law Rep. 413 (4th Cir. 2007).

10 U.S.—*Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist.*, 428 F.3d 223, 203 Ed. Law Rep. 88, 2005 FED App. 0432P (6th Cir. 2005).

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16B C.J.S. Constitutional Law § 1089

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

d. Teachers or Faculty

(2) Applications to Particular Types of Speech

§ 1089. First Amendment protection of public school employee political speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1992, 1996, 2019

The First Amendment affords free speech protection to a public school teacher's political speech and the teacher's expressive conduct or other expression in a political campaign provided the speech is not curricular and is consistent with the forum for the expression.

The test for protected public employee speech under the First Amendment, as speech on a matter of public concern,¹ includes consideration of the speech of a public school teacher as addressing the political concerns of the community.² The First Amendment affords free speech protection to the expressive conduct of a public school teacher's activity in support of a political campaign, under the application of the public concern test for speech by public employees,³ including political activity in support of⁴ or in opposition to school board members.⁵ Election matters are broadly matters of public concern for purposes of teacher speech, including elections directly concerning the school.⁶

The expression of political views may not, however, override the school's authority to control and regulate school curriculum,⁷ and a forum analysis is properly applied to determine the standards applicable to claimed rights of political expression using school facilities.⁸

When teachers are engaged in speech which members of the public might reasonably perceive to bear the imprimatur of the school, the school retains authority to refuse to sponsor speech that might reasonably be perceived to associate the school with any position other than neutrality on matters of political controversy.⁹ A school governing authority may restrict the wearing of political buttons in school settings.¹⁰

Federal employees.

The Federal Hatch Act properly applied to prohibit a District of Columbia public school teacher's partisan political candidacy, within the constraints of the First Amendment, when the prohibition established an appropriate balance of interests between the government as an employer and the teacher as an employee, ensuring that a teacher's professional advancement not be influenced because of assisting, or not assisting, a supervisor's political candidacy, or by a teacher's possible future authority over the school system.¹¹

Oaths.

Teachers may properly be required to take an oath to support the United States Constitution and the constitution and laws of the state in which they teach.¹²

CUMULATIVE SUPPLEMENT

Cases:

There was insufficient temporal proximity between superintendent's learning of high school teacher's political activities and her decisions to investigate allegation that teacher made inappropriate statements to his students, and later to suspend and terminate him, to establish causal connection required to support teacher's First Amendment retaliation claim, where superintendent first learned of teacher's political activities eight to nine months prior to initiating investigation. [U.S. Const. Amend. 1. Penley v. McDowell County Board of Education](#), 876 F.3d 646 (4th Cir. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 § 1084.
- 2 U.S.—[Hudson v. Craven](#), 403 F.3d 691, 196 Ed. Law Rep. 823 (9th Cir. 2005); [Gardetto v. Mason](#), 100 F.3d 803, 114 Ed. Law Rep. 66 (10th Cir. 1996).
- 3 U.S.—[Nagle v. Marron](#), 663 F.3d 100, 274 Ed. Law Rep. 382 (2d Cir. 2011).
Contrary policy violates First Amendment
U.S.—[Castle v. Colonial School Dist.](#), 933 F. Supp. 458, 112 Ed. Law Rep. 120 (E.D. Pa. 1996).
- 4 U.S.—[Burns v. Cook](#), 458 F. Supp. 2d 29, 214 Ed. Law Rep. 1078 (N.D. N.Y. 2006).
- 5 U.S.—[Pribula v. Wyoming Area School Dist.](#), 599 F. Supp. 2d 564, 242 Ed. Law Rep. 754 (M.D. Pa. 2009).

- 6 U.S.—*Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 222 Ed. Law Rep. 596 (10th Cir. 2007).
- 7 U.S.—*Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 215 Ed. Law Rep. 626 (7th Cir. 2007).
- As to the regulation of curricular speech, generally, see § 1088.
- 8 Wash.—*Herbert v. Washington State Public Disclosure Com'n*, 136 Wash. App. 249, 148 P.3d 1102, 215 Ed. Law Rep. 185 (Div. 1 2006).
- As to the application of a forum analysis to public school teachers' speech, generally, see § 1083.
- 9 Cal.—*California Teachers Assn. v. Governing Board*, 45 Cal. App. 4th 1383, 53 Cal. Rptr. 2d 474, 109 Ed. Law Rep. 1335 (4th Dist. 1996).
- 10 U.S.—*Weingarten v. Board of Educ. of City School Dist. of City of New York*, 680 F. Supp. 2d 595, 255 Ed. Law Rep. 144 (S.D. N.Y. 2010); *Calef v. Budden*, 361 F. Supp. 2d 493, 197 Ed. Law Rep. 93 (D.S.C. 2005).
- 11 U.S.—*Briggs v. Merit Systems Protection Bd.*, 331 F.3d 1307 (Fed. Cir. 2003).
- 12 U.S.—*Biklen v. Board of Ed., City School Dist., Syracuse, N.Y.*, 333 F. Supp. 902 (N.D. N.Y. 1971), judgment aff'd, 406 U.S. 951, 92 S. Ct. 2060, 32 L. Ed. 2d 340 (1972).
- Teacher's loyalty oath not unconstitutional**
- N.J.—*Gough v. State*, 285 N.J. Super. 516, 667 A.2d 1057, 105 Ed. Law Rep. 584 (App. Div. 1995).

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16B C.J.S. Constitutional Law § 1090

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(1) General Principles and Standards

§ 1090. General right of protected speech of public school students

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1976 to 1981

Students in public schools, colleges, and universities retain their First Amendment rights to freedom of speech and press, but the rights are not automatically coextensive with the rights of adults in other settings.

Students in public schools do not shed their First Amendment rights to freedom of speech or expression at the schoolhouse gate.¹ Likewise, public universities have a compelling interest in promoting student expression in a manner that is viewpoint neutral.² Students cannot be punished merely for expressing their personal views on the school premises unless specific constitutional criteria are satisfied.³

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,⁴ but the exercise of First Amendment rights in public schools must be applied in light of the special characteristics of the school environment, and thus, the constitutional rights of students in public schools are not automatically coextensive with the rights

of adults in other settings.⁵ The age of the students bears an important inverse relationship to the degree of control a school may exercise over student speech; as a general matter, the younger the students, the more control a school may exercise.⁶ Less leeway is afforded the administrators of a public university in regulating student speech than applies in a public elementary or secondary school.⁷

The standards applicable to protected student speech vary based on whether the speech is characterized as pure speech,⁸ school-sponsored speech,⁹ or speech that is vulgar, lewd, obscene, or plainly offensive.¹⁰

Forum analysis.

The public forum analysis applicable to the rights of outsiders to speak using public school facilities,¹¹ and applicable to the expression rights of teachers or faculty in circumstances involving the use of school facilities,¹² is generally inapplicable to questions of individual student expression¹³ but may apply in the context of school-sponsored speech and student groups or organizations.¹⁴

Public concern analysis.

Student speech that is not subject to restriction or regulation on other grounds is not subject to the requirement that it relate to a matter of public concern in order to warrant First Amendment protections as is required under a public employee analysis.¹⁵

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Footnotes

- 1 U.S.—*Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290, 220 Ed. Law Rep. 50 (2007); *Frudden v. Pilling*, 742 F.3d 1199, 302 Ed. Law Rep. 21 (9th Cir. 2014).
- 2 U.S.—*Harris v. Quinn*, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014) (referencing *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995)).
- 3 U.S.—*Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Ed. Law Rep. 515 (1988); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).
- 4 U.S.—*J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).
- 5 U.S.—*Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290, 220 Ed. Law Rep. 50 (2007); *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011); *Frudden v. Pilling*, 742 F.3d 1199, 302 Ed. Law Rep. 21 (9th Cir. 2014).
- 6 U.S.—*K.A. ex rel. Ayers v. Pocono Mountain School Dist.*, 710 F.3d 99, 290 Ed. Law Rep. 446 (3d Cir. 2013).
- 7 U.S.—*McCauley v. University of the Virgin Islands*, 54 V.I. 849, 618 F.3d 232, 260 Ed. Law Rep. 551 (3d Cir. 2010).
University setting is different
U.S.—*DeJohn v. Temple University*, 537 F.3d 301, 235 Ed. Law Rep. 745 (3d Cir. 2008).
- 8 § 1091.
- 9 §§ 909, 1092.
- 10 § 1094.
- 11 § 1077.
- 12 § 1083.

- 13 U.S.—*K.A. ex rel. Ayers v. Pocono Mountain School Dist.*, 710 F.3d 99, 290 Ed. Law Rep. 446 (3d Cir. 2013).
- 14 U.S.—*Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Ed. Law Rep. 515 (1988).
As to school-sponsored speech by students in school newspapers or periodicals, generally, see § 1093.
As to free speech by students in groups or organizations, generally, see § 1098.
- 15 U.S.—*Pinard v. Clatskanie School Dist.* 6J, 467 F.3d 755, 213 Ed. Law Rep. 952 (9th Cir. 2006).

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16B C.J.S. Constitutional Law § 1091

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(1) General Principles and Standards

§ 1091. First Amendment protection of public school student's pure speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1976 to 1981

Student speech or expression in public schools, colleges, and universities is subject to reasonable regulation or restriction if school officials can reasonably forecast that it would cause substantial disruption of, or material interference with, school activities, schoolwork or discipline, or collide with the rights of other students.

Student speech and expression in public schools is subject to regulation or restraint if school officials can reasonably forecast that it would cause substantial disruption of, or material interference with, school activities,¹ schoolwork or discipline,² or collide with the rights of other students.³ This standard, however, is subject to the distinct standards applicable to the regulation or restriction of school-sponsored speech⁴ or speech that is vulgar, lewd, obscene, or plainly offensive.⁵

The regulation or restraint under this standard must rest on something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.⁶ Public school officials are not at liberty to suppress or punish

student speech simply because they disagree with it, because it takes a political or social viewpoint different from that subscribed to by majority, or because some listeners may be offended by a controversial message.⁷ An undifferentiated fear or apprehension of disturbance is not enough to overcome the right;⁸ a specific and significant fear of disruption is required, not just some remote apprehension of disturbance.⁹ The First Amendment does not require school officials to wait until a disruption actually occurs before they may act to curtail the exercise of the right of free speech, and in fact they have a duty to prevent the occurrence of disturbances.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Vulgar comment by male secondary student, which he asserted was made in a private conversation with a limited audience, was not protected by First Amendment, as required to support § 1983 claim by student and his father against public school board, arising out of disciplinary proceeding that found student to have offensively touched and sexually harassed female classmates; while student asserted that his comment was not disruptive and was not invasive of rights of others, three female classmates were sufficiently upset that they reported comment to school administrators, and board was entitled to prohibit vulgar and offensive terms at school without needing to analyze whether terms were disruptive or invaded rights of others. [U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. Doe 2 by and through Doe 1 v. Fairfax County School Board, 384 F. Supp. 3d 598 \(E.D. Va. 2019\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 \(1969\); K.A. ex rel. Ayers v. Pocono Mountain School Dist., 710 F.3d 99, 290 Ed. Law Rep. 446 \(3d Cir. 2013\); Bell v. Itawamba County School Bd., 774 F.3d 280, 312 Ed. Law Rep. 550 \(5th Cir. 2014\), reh'g en banc granted, 782 F.3d 712 \(5th Cir. 2015\); Defoe ex rel. Defoe v. Spiva, 625 F.3d 324, 262 Ed. Law Rep. 53 \(6th Cir. 2010\); Wynar v. Douglas County School Dist., 728 F.3d 1062, 297 Ed. Law Rep. 32 \(9th Cir. 2013\).](#)
A.L.R. Library
[Validity of regulation by public-school authorities as to clothes or personal appearance of pupils, 58 A.L.R.5th 1.](#)
[Application of First Amendment in School Context—Supreme Court Cases, 57 A.L.R. Fed. 2d 1.](#)
[What oral statement of student is sufficiently disruptive so as to fall beyond protection of First Amendment, 76 A.L.R. Fed. 599.](#)
- 2 [U.S.—J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 \(3d Cir. 2011\); Defoe ex rel. Defoe v. Spiva, 625 F.3d 324, 262 Ed. Law Rep. 53 \(6th Cir. 2010\).](#)
- 3 [U.S.—K.A. ex rel. Ayers v. Pocono Mountain School Dist., 710 F.3d 99, 290 Ed. Law Rep. 446 \(3d Cir. 2013\); Wynar v. Douglas County School Dist., 728 F.3d 1062, 297 Ed. Law Rep. 32 \(9th Cir. 2013\).](#)
- 4 [§§ 909, 1092.](#)
- 5 [§ 1094.](#)
- 6 [U.S.—Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 \(1969\); J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 \(3d Cir. 2011\); Bell v. Itawamba County School Bd., 774 F.3d 280, 312 Ed. Law Rep. 550 \(5th Cir. 2014\), reh'g en banc granted, 782 F.3d 712 \(5th Cir. 2015\); Dariano v. Morgan Hill Unified School Dist., 767 F.3d 764, 309 Ed. Law Rep. 137 \(9th Cir. 2014\), cert. denied, 2015 WL 1400871 \(U.S. 2015\).](#)
- 7 [U.S.—Taylor v. Roswell Independent School Dist., 713 F.3d 25, 292 Ed. Law Rep. 22 \(10th Cir. 2013\).](#)

- 8 U.S.—*Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).
- 9 U.S.—*J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).
- 10 U.S.—*Wynar v. Douglas County School Dist.*, 728 F.3d 1062, 297 Ed. Law Rep. 32 (9th Cir. 2013).

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16B C.J.S. Constitutional Law § 1092

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(1) General Principles and Standards

§ 1092. First Amendment protection of public school student's school-sponsored speech and curriculum

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1976 to 1981

Public schools may regulate or restrict students' exercise of their right to free speech and press under the First Amendment when the speech or expression implicates the school as a speaker, particularly in school-sponsored expressive activities or contexts, provided the restrictions are reasonably related to legitimate pedagogical concerns.

Public schools may regulate or restrict students' exercise of their right to free speech and press under the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities provided the restrictions are reasonably related to legitimate pedagogical concerns.¹ It is only when a decision to censor a school-sponsored publication, a theatrical production, or other vehicle of student expression has no valid educational purpose that judicial intervention is required to protect students' free speech rights.²

The standard generally applicable for determining when a school may regulate or restrict student expression on the school premises as a matter of pure speech³ does not apply to the school's regulation or restriction of student expression in the name of the school or using school resources on the basis of legitimate pedagogical concerns.⁴

The closer a student's expression comes to school-sponsored speech, the less likely the First Amendment protects it.⁵ Educators enjoy far greater latitude to regulate student speech that occurs within the context of school-sponsored activities, or activities that may fairly be characterized as part of the school curriculum, and regulations do not offend the First Amendment so long as they are reasonably related to legitimate pedagogical concerns.⁶

The neutral enforcement of a legitimate school curriculum generally will satisfy this requirement while the selective enforcement of such a curriculum, or the singling out of one student for discipline based on hostility to the student's speech, will not.⁷ A public school is not required to tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school.⁸

The critical inquiry in deciding whether student speech is school-sponsored in the context of a First Amendment inquiry is whether it could reasonably be understood to bear the school's imprimatur, which is synonymous with sanction or approval by the school; relevant considerations include (1) where and when the speech occurred, (2) to whom the speech was directed and whether recipients were a captive audience, (3) whether the speech occurred during an event or activity organized by the school, conducted pursuant to official guidelines, or supervised by school officials, and (4) whether the activities where the speech occurred were designed to impart some knowledge or skills to the students.⁹

A school's restrictions on speech reasonably related to legitimate pedagogical concerns must still be viewpoint-neutral.¹⁰ As with any other nonpublic forum, once the school board determines that certain speech is appropriate for its students, it may not discriminate between speakers who will speak on the topic merely because it disagrees with their views.¹¹

A public high school student's valedictory speech at a graduation ceremony was school-sponsored speech subject to the school's unwritten policy of prescreening the contents of speeches as reasonably related to its legitimate pedagogical concerns.¹²

Fees for speech programs.

The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech although objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support; the proper measure, and the principal standard of protection for objecting students, is the requirement of viewpoint neutrality in the allocation of funding support.¹³

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Footnotes

- 1 U.S.—*Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Ed. Law Rep. 515 (1988); *Morgan v. Swanson*, 659 F.3d 359, 273 Ed. Law Rep. 524 (5th Cir. 2011); *Ward v. Polite*, 667 F.3d 727, 276 Ed. Law Rep. 593 (6th Cir. 2012); *Taylor v. Roswell Independent School Dist.*, 713 F.3d 25, 292 Ed. Law Rep. 22 (10th Cir. 2013).
- 2 U.S.—*Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Ed. Law Rep. 515 (1988).
- 3 § 1090.

- 4 U.S.—Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Ed. Law
Rep. 515 (1988).
- 5 U.S.—Ward v. Polite, 667 F.3d 727, 276 Ed. Law Rep. 593 (6th Cir. 2012).
- 6 U.S.—Morgan v. Swanson, 659 F.3d 359, 273 Ed. Law Rep. 524 (5th Cir. 2011).
- 7 U.S.—Ward v. Polite, 667 F.3d 727, 276 Ed. Law Rep. 593 (6th Cir. 2012).
- 8 U.S.—Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Ed. Law
Rep. 515 (1988); Ward v. Polite, 667 F.3d 727, 276 Ed. Law Rep. 593 (6th Cir. 2012).
- 9 U.S.—Morgan v. Swanson, 659 F.3d 359, 273 Ed. Law Rep. 524 (5th Cir. 2011).
- 10 U.S.—Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 117 Ed. Law Rep. 462 (11th Cir. 1997).
- 11 U.S.—Searcey v. Harris, 888 F.2d 1314, 56 Ed. Law Rep. 1134 (11th Cir. 1989).
- 12 U.S.—Corder v. Lewis Palmer School Dist. No. 38, 566 F.3d 1219, 244 Ed. Law Rep. 994 (10th Cir. 2009).
- 13 U.S.—Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 120 S. Ct. 1346,
146 L. Ed. 2d 193, 142 Ed. Law Rep. 624 (2000).

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16B C.J.S. Constitutional Law § 1093

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(1) General Principles and Standards

§ 1093. First Amendment protection of public school student's school-sponsored speech and curriculum—Newspapers or periodicals

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1986, 2015

Magazines and newspapers produced by students of public schools, colleges, or universities are within the protection of the First Amendment rights of free speech and press.

School magazines and newspapers produced by students of public schools and government operated colleges are within the protection of the First Amendment guaranty of free speech and press¹ and may constitute a public forum when so created by the state or school,² whether constituting, under the circumstances and conditions, a designated or traditional public forum,³ or a limited public forum.⁴

Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in a school-sponsored paper so long as their actions are reasonably related to legitimate pedagogical concerns.⁵ Total censorship

or prohibition of the publication of certain matters by the state or by school authorities is valid only if supported by a strong showing that the forbidden material would substantially interfere with the requirements of appropriate discipline in the operation of the school.⁶

The publication of a school newspaper as part of a journalism course under the supervision of the school faculty does not convert a curricular newspaper into a public forum and remains subject to reasonable restrictions as a nonpublic forum.⁷ A public school newspaper constituting a limited public forum, as therefore subject to speech restriction by the school in a manner that is viewpoint neutral and reasonable in light of its purpose, could be barred from publishing lewd cartoons depicting sexual positions with stick figures.⁸

As far as the First Amendment is concerned, a university can choose not to own or support any newspapers so long as its motivation is permissible.⁹

Computer news servers.

A university policy establishing computer news servers for the use of students and faculty, limiting access to news groups with content deemed potentially obscene, is not an unconstitutional restriction on the freedom of speech when the restrictive policy limits news service to those purposes for which the computer system was purchased, namely research and academic purposes.¹⁰

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Footnotes

- 1 U.S.—[Rosenberger v. Rector and Visitors of University of Virginia](#), 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995); [R.O. ex rel. Ochshorn v. Ithaca City School Dist.](#), 645 F.3d 533, 269 Ed. Law Rep. 464 (2d Cir. 2011).
No right to religious publication in high school
U.S.—[Hemry by Hemry v. School Bd. of Colorado Springs School Dist. No. 11](#), 760 F. Supp. 856, 67 Ed. Law Rep. 142 (D. Colo. 1991).
- 2 U.S.—[Rosenberger v. Rector and Visitors of University of Virginia](#), 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995).
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Validity, under Federal Constitution, of public school or state college regulation of student newspapers, magazines, or other publications—federal cases, 16 A.L.R. Fed. 182.
- 3 U.S.—[Hosty v. Carter](#), 412 F.3d 731, 199 Ed. Law Rep. 91 (7th Cir. 2005).
- 4 U.S.—[R.O. ex rel. Ochshorn v. Ithaca City School Dist.](#), 645 F.3d 533, 269 Ed. Law Rep. 464 (2d Cir. 2011); [Dean v. Utica Community Schools](#), 345 F. Supp. 2d 799, 194 Ed. Law Rep. 188 (E.D. Mich. 2004).
- 5 U.S.—[Hazelwood School Dist. v. Kuhlmeier](#), 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Ed. Law Rep. 515 (1988); [R.O. ex rel. Ochshorn v. Ithaca City School Dist.](#), 645 F.3d 533, 269 Ed. Law Rep. 464 (2d Cir. 2011); [Curry ex rel Curry v. Hensiner](#), 513 F.3d 570, 229 Ed. Law Rep. 30 (6th Cir. 2008).
- 6 U.S.—[Nicholson v. Board of Educ. Torrance Unified School Dist.](#), 682 F.2d 858, 5 Ed. Law Rep. 733 (9th Cir. 1982).
- 7 U.S.—[Myers v. Loudoun County School Bd.](#), 500 F. Supp. 2d 539, 223 Ed. Law Rep. 786 (E.D. Va. 2007).
- 8 U.S.—[R.O. ex rel. Ochshorn v. Ithaca City School Dist.](#), 645 F.3d 533, 269 Ed. Law Rep. 464 (2d Cir. 2011).
- 9 U.S.—[Stanley v. Magrath](#), 719 F.2d 279, 14 Ed. Law Rep. 75 (8th Cir. 1983).
- 10 U.S.—[Loving v. Boren](#), 956 F. Supp. 953, 117 Ed. Law Rep. 169 (W.D. Okla. 1997), judgment aff'd, 133 F.3d 771, 123 Ed. Law Rep. 48 (10th Cir. 1998).

16B C.J.S. Constitutional Law § 1094

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(2) Applications to Particular Speech or Activities

§ 1094. First Amendment protection of public school student's vulgar, lewd, obscene, or plainly offensive speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1976 to 1981, 2010

Public schools may prohibit students' use of vulgar, lewd, obscene, and plainly offensive speech in public discourse without violating the students' rights of expression under the First Amendment.

Public schools may prohibit students' use of vulgar, lewd, obscene, and plainly offensive speech in public discourse without violating the students' rights of expression under the First Amendment¹ unless the speech can be plausibly interpreted as commenting on a political or social issue.² The freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior.³ The First Amendment guarantees wide freedoms in matters of adult public discourse, but it does not follow that simply because an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that same latitude must be permitted to children in a public school.⁴

The determination of what manner of speech in the classroom or in a school assembly is inappropriate properly rests with the school, and whether a reasonable observer could interpret student speech as lewd, profane, vulgar, or offensive depends on the plausibility of the school's interpretation in light of competing meanings.⁵ In so doing, a court must consider that the reasonable observer would not adopt a noncontextual interpretation and that the subjective intent of the speaker is irrelevant.⁶

While less leeway is afforded the administrators of a public university in regulating student speech than applies in a public elementary or secondary school,⁷ a university's student code of conduct could prohibit verbal assault or lewd, indecent, or obscene conduct or expressions on university owned or controlled property or at university sponsored or supervised functions since the terms could collectively be interpreted to prohibit only speech that was unprotected by the First Amendment under the generally applicable constitutional test for obscenity.⁸

School officials can promulgate a dress code prohibiting students from wearing shirts displaying vulgar, obscene, or derogatory messages,⁹ including, as applied, a ban on clothing that displays racial or ethnic slurs, gang affiliations, sexually suggestive images or language,¹⁰ or the Confederate flag.¹¹ A restriction on derogatory comments referring to students' sexual orientation, while appearing to satisfy First Amendment constraints, could not apply to bar a T-shirt slogan that was only tepidly negative.¹² A school could reasonably prohibit students' wearing clothing bearing the American flag on "Cinco de Mayo Day" as based on a reasonable forecast of substantial disruption in light of a history of racial tension and gang violence connected with the event.¹³

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Footnotes

- 1 U.S.—*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549, 32 Ed. Law Rep. 1243 (1986); *Cox v. Warwick Valley Cent. School Dist.*, 654 F.3d 267, 272 Ed. Law Rep. 159 (2d Cir. 2011); *K.A. ex rel. Ayers v. Pocono Mountain School Dist.*, 710 F.3d 99, 290 Ed. Law Rep. 446 (3d Cir. 2013); *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 290 Ed. Law Rep. 484 (4th Cir. 2013), cert. denied, 134 S. Ct. 201, 187 L. Ed. 2d 46 (2013).
A.L.R. Library
What oral statement of student is sufficiently disruptive so as to fall beyond protection of First Amendment, 76 A.L.R. Fed. 599.
- 2 U.S.—*B.H. ex rel. Hawk v. Easton Area School Dist.*, 725 F.3d 293, 296 Ed. Law Rep. 752 (3d Cir. 2013), cert. denied, 134 S. Ct. 1515, 188 L. Ed. 2d 450, 302 Ed. Law Rep. 485 (2014).
- 3 U.S.—*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549, 32 Ed. Law Rep. 1243 (1986).
- 4 U.S.—*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549, 32 Ed. Law Rep. 1243 (1986).
- 5 U.S.—*B.H. ex rel. Hawk v. Easton Area School Dist.*, 725 F.3d 293, 296 Ed. Law Rep. 752 (3d Cir. 2013), cert. denied, 134 S. Ct. 1515, 188 L. Ed. 2d 450, 302 Ed. Law Rep. 485 (2014).
- 6 U.S.—*B.H. ex rel. Hawk v. Easton Area School Dist.*, 725 F.3d 293, 296 Ed. Law Rep. 752 (3d Cir. 2013), cert. denied, 134 S. Ct. 1515, 188 L. Ed. 2d 450, 302 Ed. Law Rep. 485 (2014).
- 7 § 1090.
- 8 U.S.—*McCauley v. University of the Virgin Islands*, 54 V.I. 849, 618 F.3d 232, 260 Ed. Law Rep. 551 (3d Cir. 2010).
- 9 U.S.—*Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 290 Ed. Law Rep. 484 (4th Cir. 2013), cert. denied, 134 S. Ct. 201, 187 L. Ed. 2d 46 (2013); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 262 Ed. Law Rep. 53 (6th Cir. 2010).
A.L.R. Library
Validity of regulation by public-school authorities as to clothes or personal appearance of pupils, 58 A.L.R.5th 1.

- 10 U.S.—Defoe ex rel. Defoe v. Spiva, 625 F.3d 324, 262 Ed. Law Rep. 53 (6th Cir. 2010).
- 11 U.S.—Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 290 Ed. Law Rep. 484 (4th Cir. 2013), cert. denied, 134 S. Ct. 201, 187 L. Ed. 2d 46 (2013); Defoe ex rel. Defoe v. Spiva, 625 F.3d 324, 262 Ed. Law Rep. 53 (6th Cir. 2010); B.W.A. v. Farmington R-7 School Dist., 554 F.3d 734, 241 Ed. Law Rep. 41 (8th Cir. 2009).
- 12 U.S.—Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. # 204, 523 F.3d 668, 231 Ed. Law Rep. 618 (7th Cir. 2008).
- 13 U.S.—Dariano v. Morgan Hill Unified School Dist., 767 F.3d 764, 309 Ed. Law Rep. 137 (9th Cir. 2014), cert. denied, 2015 WL 1400871 (U.S. 2015).

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16B C.J.S. Constitutional Law § 1095

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(2) Applications to Particular Speech or Activities

§ 1095. First Amendment protection of public school student's speech advocating violence or making threats

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1976 to 1981, 2010

Public schools may prohibit students' use of speech advocating violence or making threats without violating the students' rights of expression under the First Amendment.

Public school speech restrictions may validly apply to students' violent and threatening language, without violating the students' rights of expression under the First Amendment, based on the school's determination that the language or the message is reasonably likely to substantially disrupt the school.¹ Students do not have a First Amendment right to knowingly make comments, whether oral or written, that reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day.² The principle applies as well to student drawings depicting violence against the school and teachers.³

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Footnotes

- 1 U.S.—*Wynar v. Douglas County School Dist.*, 728 F.3d 1062, 297 Ed. Law Rep. 32 (9th Cir. 2013); *Boim v. Fulton County School Dist.*, 494 F.3d 978, 223 Ed. Law Rep. 109 (11th Cir. 2007).
Kindergarten student threatening to shoot
U.S.—*S.G. ex rel. A.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 178 Ed. Law Rep. 36 (3d Cir. 2003).
- 2 U.S.—*Cuff ex rel. B.C. v. Valley Cent. School Dist.*, 677 F.3d 109, 279 Ed. Law Rep. 18 (2d Cir. 2012).
Reasonable perception of threat by recipient
U.S.—*Doe v. Pulaski County Special School Dist.*, 306 F.3d 616, 170 Ed. Law Rep. 43 (8th Cir. 2002).
- 3 U.S.—*Cuff ex rel. B.C. v. Valley Cent. School Dist.*, 677 F.3d 109, 279 Ed. Law Rep. 18 (2d Cir. 2012).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(2) Applications to Particular Speech or Activities

§ 1096. First Amendment protection of public school student's speech advocating illegal substance or drug use

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1976 to 1981, 2010

Public schools may prohibit students' use of speech advocating illegal drug use without violating the students' rights of expression under the First Amendment.

Public schools may restrict speech by students, without violating the students' rights of expression under the First Amendment, if a reasonable observer would interpret the speech as advocating illegal drug use and if it cannot plausibly be interpreted as commenting on any political or social issue.¹

School officials can promulgate a dress code prohibiting students from promoting, or language or displays promoting, products students may not legally buy, such as alcohol, tobacco, and illegal drugs.²

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Footnotes

- 1 U.S.—*Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290, 220 Ed. Law Rep. 50 (2007); *B.H. ex rel. Hawk v. Easton Area School Dist.*, 725 F.3d 293, 296 Ed. Law Rep. 752 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1515, 188 L. Ed. 2d 450, 302 Ed. Law Rep. 485 (2014).
Accord
U.S.—*Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. # 204*, 523 F.3d 668, 231 Ed. Law Rep. 618 (7th Cir. 2008).
- 2 U.S.—*Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 262 Ed. Law Rep. 53 (6th Cir. 2010).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(2) Applications to Particular Speech or Activities

§ 1097. First Amendment protection of demonstrations or protests by public school students

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1978, 1980, 2012

The right of public school students to exercise their freedom of speech by participating in demonstrations is protected by the First Amendment provided the demonstration is nondisruptive and nonviolent.

The right of public school students to exercise their freedom of speech by participating in demonstrations is protected by the First Amendment, without regard to whether the subject of the demonstration is national policy or local school board policy,¹ provided the demonstration is nondisruptive and nonviolent.²

First Amendment protections do not extend to a demonstration that is reasonably forecast to or actually causes a material disruption of class work, involves a substantial disorder or invasion of the rights of others, or constitutes a material and substantial interference with discipline.³ When a demonstration adjacent to school property but not on school property interferes with the conduct of the school, a court may enjoin future demonstrations.⁴

Freedom of speech is not violated by a content-neutral anti-truancy policy that is unrelated to suppression of protected expression.⁵

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Footnotes

- 1 U.S.—*Lowry ex rel. Crow v. Watson Chapel School Dist.*, 540 F.3d 752, 236 Ed. Law Rep. 158 (8th Cir. 2008).
- 2 U.S.—*Grzywna ex rel. Doe v. Schenectady Central School Dist.*, 489 F. Supp. 2d 139, 221 Ed. Law Rep. 583 (N.D. N.Y. 2006).
- 3 U.S.—*Shamloo v. Mississippi State Bd. of Trustees of Institutions of Higher Learning*, 620 F.2d 516 (5th Cir. 1980).
- 4 U.S.—*Pickens v. Okolona Municipal Separate School Dist.*, 594 F.2d 433 (5th Cir. 1979).
- 5 U.S.—*Corales v. Bennett*, 567 F.3d 554, 244 Ed. Law Rep. 1045 (9th Cir. 2009).

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16B C.J.S. Constitutional Law § 1098

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(2) Applications to Particular Speech or Activities

§ 1098. First Amendment protection of groups and organizations of public school students

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑1984

The relationship of a public school or university with its student organizations is subject to the First Amendment guaranty of free speech and press.

The relationship of a school or university with its student organizations is subject to the First Amendment guaranty of free speech and press.¹

In the absence of creating a public forum, a public school may restrict students' group or organizational activities to those related to school curriculum.² When, however, the school creates an open public forum, making its facilities available for student groups or organizations, it must apply constitutionally permissible standards to deny after-school student-sponsored clubs access to school premises and other facilities,³ and it may not discriminate against student groups or organizations as addressing sexual orientation,⁴ or as religiously or politically oriented.⁵

A high school creates a limited public forum by recognizing noncurricular student groups or organizations and permitting them to meet during the school's noninstructional time, and may not then engage in viewpoint discrimination in granting or denying recognition to particular student groups or organizations, in the absence of a showing that the action is based on something more than desire to avoid discomfort and unpleasantness of tolerating a minority of students whose sexual identity is distinct from the majority of students and discordant to the board's abstinence-only program.⁶

Under a limited public forum analysis, reasonable content-neutral, viewpoint neutral regulations are sustainable if divorced from the content of the message to be conveyed in the absence of pretextual reasons.⁷ Restrictions may not apply to a religious student group, denying it access to student and staff time, school supplies, and school equipment or vehicles to convey its message, when the restrictions do not apply to other student groups, in the absence of a compelling state interest, since the restrictions constitute viewpoint restrictions.⁸

CUMULATIVE SUPPLEMENT

Cases:

Schools exercised substantial control over messages conveyed by banners hung on schools' fences, and thus government's control over message factor strongly suggested that banners were government speech, rather than private speech, as would support finding that removal of tutoring business banners did not violate Free Speech Clause of First Amendment, where schools controlled design, typeface, and color of banners, dictated information contained on banner, regulated size and location of banners, required banners to include school's initials and message "Partner in Excellence," and principals were required to approve every banner before it went on fence, and schools did not allow banners to list anything but sponsor's name, contact information, and preexisting business logo. [U.S.C.A. Const.Amend. 1. *Mech v. School Bd. of Palm Beach County, Fla.*, 806 F.3d 1070 \(11th Cir. 2015\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—*Truth v. Kent School Dist.*, 542 F.3d 634 \(9th Cir. 2008\) \(overruled on other grounds by, *Los Angeles County, Cal. v. Humphries*, 562 U.S. 29, 131 S. Ct. 447, 178 L. Ed. 2d 460 \(2010\)\); *Gonzalez Through Gonzalez v. School Bd. of Okeechobee County*, 571 F. Supp. 2d 1257, 237 Ed. Law Rep. 291 \(S.D. Fla. 2008\).](#)
- 2 [U.S.—*Bible Club v. Placentia-Yorba Linda School Dist.*, 573 F. Supp. 2d 1291, 237 Ed. Law Rep. 701 \(C.D. Cal. 2008\).](#)
- 3 [U.S.—*Bible Club v. Placentia-Yorba Linda School Dist.*, 573 F. Supp. 2d 1291, 237 Ed. Law Rep. 701 \(C.D. Cal. 2008\); *East High School Prism Club v. Seidel*, 95 F. Supp. 2d 1239, 144 Ed. Law Rep. 260 \(D. Utah 2000\).](#)
- 4 [U.S.—*East High School Prism Club v. Seidel*, 95 F. Supp. 2d 1239, 144 Ed. Law Rep. 260 \(D. Utah 2000\).](#)
- 5 [U.S.—*Bible Club v. Placentia-Yorba Linda School Dist.*, 573 F. Supp. 2d 1291, 237 Ed. Law Rep. 701 \(C.D. Cal. 2008\).](#)
- 6 [U.S.—*Gonzalez Through Gonzalez v. School Bd. of Okeechobee County*, 571 F. Supp. 2d 1257, 237 Ed. Law Rep. 291 \(S.D. Fla. 2008\).](#)
- 7 [U.S.—*Truth v. Kent School Dist.*, 542 F.3d 634 \(9th Cir. 2008\) \(overruled on other grounds by, *Los Angeles County, Cal. v. Humphries*, 562 U.S. 29, 131 S. Ct. 447, 178 L. Ed. 2d 460 \(2010\)\).](#)

8 U.S.—[Prince v. Jacoby](#), 303 F.3d 1074, 169 Ed. Law Rep. 85 (9th Cir. 2002) (rejected on other grounds by, [Donovan ex rel. Donovan v. Punxsutawney Area School Bd.](#), 336 F.3d 211, 179 Ed. Law Rep. 48 (3d Cir. 2003)).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

12. Public Schools, Colleges, and Universities

e. Students

(2) Applications to Particular Speech or Activities

§ 1099. First Amendment protection of off-campus speech or activity of public school students

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1576 to 1981, 2009

A public school student's speech or expressive conduct outside the school context or not on the school premises is protected under the First Amendment coextensive with that of an adult, but restraints may be imposed if the speech or expression occurs at a school-sponsored event or if it is foreseeably disruptive of school.

A public school student's speech or expressive conduct outside the school context or not on the school premises is protected under the First Amendment coextensive with that of an adult.¹ That a student's speech would be subject to restriction or regulation if delivered in the school context does not affect the student's rights in a public forum outside the school context.²

Schools may punish student expressive conduct that occurs outside of school, as if it occurred inside the "schoolhouse gate," under certain very limited circumstances,³ as when the student's off-campus speech or expressive conduct is foreseeably disruptive of school and inconsistent with the school's educational mission.⁴ A school cannot punish a student for off-campus

speech that is not school-sponsored or at a school-sponsored event⁵ and that causes no substantial disruption at school⁶ and that is not lewd or vulgar or does not threaten or advocate illegal or dangerous behavior.⁷

CUMULATIVE SUPPLEMENT

Cases:

State college's removal of student from its associate degree nursing program for unprofessional behavior and transgression of professional boundaries, based on his statements on his social media page, did not violate student's First Amendment free speech rights, even though offending comments were not made on campus, and college officials did not cite specific professional standards that student violated, where program incorporated nationally established nursing standards, student consented to be bound by those standards, program's handbook stated that violation of moral, ethical, or professional standards could result in dismissal from program, standards were widely recognized and followed, and decision to dismiss student occurred only after college's director of nursing met with student and determined not only that he had crossed professional boundaries line, but that he had no understanding of what he did or why it was wrong and evidenced no remorse for his actions. [U.S. Const. Amend. 1. Keefe v. Adams](#), 840 F.3d 523 (8th Cir. 2016).

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Footnotes

- 1 U.S.—J.S. ex rel. *Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).
A.L.R. Library
Right to discipline pupil for conduct away from school grounds or not immediately connected with school activities, 53 A.L.R.3d 1124.
- 2 U.S.—*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549, 32 Ed. Law Rep. 1243 (1986); J.S. ex rel. *Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).
- 3 U.S.—*Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205, 271 Ed. Law Rep. 638 (3d Cir. 2011).
- 4 U.S.—*Doninger v. Niehoff*, 527 F.3d 41, 233 Ed. Law Rep. 30, 35 A.L.R.6th 703 (2d Cir. 2008); S.J.W. ex rel. *Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771, 285 Ed. Law Rep. 752 (8th Cir. 2012); *Wynar v. Douglas County School Dist.*, 728 F.3d 1062, 297 Ed. Law Rep. 32 (9th Cir. 2013).
- 5 U.S.—J.S. ex rel. *Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).
- 6 U.S.—*Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205, 271 Ed. Law Rep. 638 (3d Cir. 2011); *Evans v. Bayer*, 684 F. Supp. 2d 1365, 255 Ed. Law Rep. 728 (S.D. Fla. 2010).
- 7 U.S.—*Evans v. Bayer*, 684 F. Supp. 2d 1365, 255 Ed. Law Rep. 728 (S.D. Fla. 2010).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

a. In General

§ 1100. General right of protected speech for political candidates

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1680

The First Amendment guaranty of free speech has its fullest and most urgent application to speech uttered during a campaign for political office, affording the broadest protection to core political expression.

The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office,¹ characterized as core political expression,² requiring the most exacting strict scrutiny and compelling government interests to sustain any law or regulation that burdens core political speech.³ Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people.⁴ The discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by the Constitution, and the First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.⁵ It is not the function of government to select which issues are worth discussing or debating in the course of a political campaign.⁶

The First Amendment protects political campaign speech despite popular opposition.⁷ Debate on the qualifications of candidates is at the core of the electoral process and of the First Amendment freedoms.⁸

CUMULATIVE SUPPLEMENT

Cases:

When a private entity decides to host political speech, its First Amendment protections are at their apex. [U.S. Const. Amend. 1. *Washington Post v. McManus*, 944 F.3d 506 \(4th Cir. 2019\).](#)

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Footnotes

- 1 U.S.—[McCutcheon v. Federal Election Com'n](#), 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014); [Arizona Free Enterprise Club's Freedom Club PAC v. Bennett](#), 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); [Citizens United v. Federal Election Com'n](#), 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).
- 2 U.S.—[Republican Party of Minnesota v. White](#), 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002); [McIntyre v. Ohio Elections Com'n](#), 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); [Pest Committee v. Miller](#), 626 F.3d 1097 (9th Cir. 2010).
- 3 § 1101.
- 4 U.S.—[McCutcheon v. Federal Election Com'n](#), 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).
- 5 U.S.—[McIntyre v. Ohio Elections Com'n](#), 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).
- 6 U.S.—[Republican Party of Minnesota v. White](#), 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).
- 7 U.S.—[McCutcheon v. Federal Election Com'n](#), 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).
- 8 U.S.—[Republican Party of Minnesota v. White](#), 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

a. In General

§ 1101. Standard for limitation or restriction of political speech

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1680, 1681

The First Amendment guaranty of free speech, as applied in the context of political elections, candidates, and political speech, requires the most exacting strict scrutiny, compelling government interests, and narrow tailoring to achieve those interests in order to sustain a burdensome or restrictive law or regulation.

The First Amendment guaranty of free speech, as applied in the context of political elections, candidates, and political speech, requires the most exacting strict scrutiny and compelling government interests to sustain any burdensome or restrictive law or regulation.¹ Under the strict-scrutiny test, the party defending a content-based restriction of speech by candidates for public office has the burden to prove that the restriction is (1) narrowly tailored, to serve (2) a compelling state interest.²

Under strict scrutiny of a statute regulating political speech in the context of elections, a narrowly tailored regulation is one that is necessary and actually advances the state's interest, is not over-inclusive in sweeping too broadly, is not under-inclusive in leaving significant influences bearing on the interest unregulated, and is the least-restrictive alternative in that it could be not replaced by another regulation that could advance the interest as well with less infringement of speech.³

CUMULATIVE SUPPLEMENT

Cases:

Ohio's political false-statements laws were not narrowly tailored to protect integrity of state's elections, specifically with respect to their application to commercial intermediaries, and thus these laws did not survive strict scrutiny on First Amendment challenge, where these laws created broad prohibition that applied to anyone who advertised, posted, published, circulated, distributed, or otherwise disseminated false political speech, and thus were not limited to speakers of false statements. [U.S.C.A. Const.Amend. 1](#); [Ohio R.C. § 3517.21\(B\)\(9, 10\)](#). [Susan B. Anthony List v. Driehaus](#), 814 F.3d 466 (6th Cir. 2016).

Ohio's political false-statements laws were subject to strict scrutiny under Supreme Court's *Reed v. Town of Gilbert* decision, which sought to clarify level of review due to certain speech prohibitions, since these laws only governed speech about political candidates during election, and thus were content-based restrictions focused on specific subject matter. [U.S.C.A. Const.Amend. 1](#); [Ohio R.C. § 3517.21\(B\)\(9, 10\)](#). [Susan B. Anthony List v. Driehaus](#), 814 F.3d 466 (6th Cir. 2016).

In order to satisfy strict scrutiny for a First Amendment violation, a regulation of speech must be narrowly tailored to serve a compelling interest. [U.S.C.A. Const.Amend. 1](#). [O'Toole v. O'Connor](#), 802 F.3d 783 (6th Cir. 2015).

While protecting children is a compelling government interest, for purpose of analyzing a First Amendment challenge to a law restricting speech, under the strict scrutiny standard, speech cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. [U.S. Const. Amend. 1](#). [Otto v. City of Boca Raton, Florida](#), 981 F.3d 854 (11th Cir. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett](#), 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); [Republican Party of Minnesota v. White](#), 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).
Unnecessary abridgement cannot survive rigorous review
[U.S.—McCutcheon v. Federal Election Com'n](#), 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).
- 2 [U.S.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett](#), 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); [Citizens United v. Federal Election Com'n](#), 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); [Republican Party of Minnesota v. White](#), 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).
- 3 [U.S.—281 Care Committee v. Arneson](#), 766 F.3d 774 (8th Cir. 2014), cert. denied, 135 S. Ct. 1550 (2015).

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16B C.J.S. Constitutional Law § 1102

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Constitutional Law

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

a. In General

§ 1102. First Amendment protection of speech of judicial candidates

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2054 to 2056

The First Amendment guaranty of free speech extends to candidates for judicial offices, subjecting limits or restrictions to a test of strict scrutiny for a compelling government interest and narrow tailoring to achieve those interests.

The First Amendment guaranty of free speech extends to candidates for judicial offices, subjecting limits or restrictions to a test of strict scrutiny for a compelling government interest and narrow tailoring to achieve those interests.¹ A state's power to dispense with elections of judges altogether does not include the lesser power to conduct judicial elections under conditions of state-imposed voter ignorance by restricting the speech of judicial candidates; if the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles.² Along with knowing a judicial candidate's views on legal or political issues, voters have a right to know how political their potential judge might be, and to the extent states wish to avoid a politicized judiciary, they can choose to do so by not electing judges rather than restricting political speech by judicial candidates.³

While states have a compelling interest in the appearance and actuality of judicial impartiality,⁴ they do not have a compelling interest in preventing judicial candidates from announcing views on legal or political issues.⁵

The State's interests do not support per se regulation of the speech of judicial candidates in personally soliciting or accepting campaign contributions, or making speeches for, fund raising for, or endorsing or opposing, other candidates.⁶ Other authorities, however, uphold certain political activity restrictions of state judicial conduct codes, including prohibitions against a judicial candidate making commitments that would be inconsistent with the impartial performance of judicial office, acting as a leader or holding an office in a political organization or making speeches on behalf of a political organization, personally soliciting or accepting campaign contributions,⁷ or soliciting funds for political organizations or candidates and endorsing other candidates.⁸

A judicial conduct regulation is overbroad and not sufficiently tailored to preserving integrity, impartiality, and independence of the judiciary when it prohibits false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results.⁹

A provision of a judicial code of conduct stating that a judge must resign to run for any elective office rests on a rational predicate and does not violate the guarantees of freedom of speech in the state and federal constitutions when the provision rationally seeks to separate a judge's political, legislative, or executive branch ambitions from the judge's judicial decision-making to further the objective of maintaining a judiciary that is independent and impartial both in fact and in the public's perception.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Provisions of Arizona Code of Judicial Conduct prohibiting judicial candidates from personally soliciting funds for another candidate or political organization, publicly endorsing another candidate for public office, making speeches on behalf of another candidate or political organization, or actively taking part in any political campaign were narrowly tailored to achieve state's compelling interest in upholding public confidence in judiciary, and thus did not violate candidate's free speech rights, even though state could have prohibited more types of endorsements or campaign participation, provisions banned involvement with ballot measures and endorsement of candidates who were highly unlikely to appear before judge, and recusal was available in individual cases; state squarely aimed at preventing conduct that could erode judiciary's credibility, provisions did not prevent judicial candidates from announcing their views on disputed legal and political subjects, and recusal would cause insurmountable burden in some jurisdictions and could cause erosion of public confidence in judiciary. [U.S.C.A. Const.Amend. 1](#); [17A A.R.S. Sup.Ct.Rules](#), Rule 81, Code of Jud.Conduct, Rule 4.1(A)(2–5). [Wolfson v. Concannon](#), 811 F.3d 1176 (9th Cir. 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Republican Party of Minnesota v. White](#), 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002); [Carey v. Wolnitzek](#), 614 F.3d 189 (6th Cir. 2010); [Siefert v. Alexander](#), 608 F.3d 974 (7th Cir. 2010); [Wolfson v. Concannon](#), 750 F.3d 1145 (9th Cir. 2014).
- 2 [U.S.—Republican Party of Minnesota v. White](#), 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).
- 3 [U.S.—Wolfson v. Concannon](#), 750 F.3d 1145 (9th Cir. 2014).
- 4 [U.S.—Carey v. Wolnitzek](#), 614 F.3d 189 (6th Cir. 2010); [Wersal v. Sexton](#), 674 F.3d 1010 (8th Cir. 2012); [Wolfson v. Concannon](#), 750 F.3d 1145 (9th Cir. 2014).

- 5 U.S.—*Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002);
Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010).
- 6 U.S.—*Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005); *Wolfson v. Concannon*, 750
F.3d 1145 (9th Cir. 2014).
- Invalid regulation of public statements**
U.S.—*Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).
- Invalid ban on endorsements**
U.S.—*Sanders County Republican Cent. Committee v. Bullock*, 698 F.3d 741 (9th Cir. 2012).
- Invalid ban on party affiliation**
U.S.—*Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010).
- Invalid ban on solicitations**
U.S.—*Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010).
- 7 U.S.—*Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010).
- 8 U.S.—*Wersal v. Sexton*, 674 F.3d 1010 (8th Cir. 2012).
- 9 U.S.—*Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).
- 10 Me.—*In re Dunleavy*, 2003 ME 124, 838 A.2d 338 (Me. 2003).

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16B C.J.S. Constitutional Law § 1103

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

b. Regulation of Particular Activities

§ 1103. First Amendment protection of distribution of campaign literature or information

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1684

The First Amendment guaranty of free speech generally prohibits limitations or restrictions on the distribution of political campaign literature or information.

The First Amendment guaranty of free speech prohibits limitations or restrictions on the distribution of political campaign literature or information, subjecting any such requirements to strict scrutiny for narrow tailoring to serve compelling state interests, thus rendering invalid any content-based restriction on the distribution of campaign literature that fails to meet the test.¹ Distributing campaign information in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression, and no form of speech is entitled to greater constitutional protection.²

A state statute requiring advance notice before the distribution of political literature and advertising by political action committees is a content-based restriction subject to strict scrutiny and is invalid as not substantially related to nor narrowly tailored to serving the State's interests in promoting an informed electorate, protecting voters from confusion and

misinformation, or avoiding corruption in the political process.³ A desire to deter last minute negative campaigning by those whom candidates for public office cannot control is not a legitimate state interest justifying such an advance notice requirement.⁴

A state's statutory prohibition against the distribution of anonymous campaign literature cannot be justified under the First Amendment as means of preventing the dissemination of untruths, when the statute contains no language limiting its application to fraudulent, false, or libelous statements, and the State's simple interest in providing voters with additional relevant information is not sufficient.⁵ The anonymous distribution of political information is not a pernicious, fraudulent practice but is an honorable tradition of advocacy and of dissent; anonymity is a shield from the tyranny of the majority.⁶ A state statute that requires groups or entities publishing material or information relating to an election candidate or ballot question to reveal on the publication the names and addresses of the publication's financial sponsors is a content-based limitation on core political speech that is invalid when less restrictive means are available to further the State's articulated interest in helping voters evaluate usefulness of information, preventing fraud, and enforcing campaign finance laws.⁷

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Footnotes

- 1 U.S.—[McIntyre v. Ohio Elections Com'n](#), 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); [American Civil Liberties Union of Nevada v. Heller](#), 378 F.3d 979 (9th Cir. 2004); [Arizona Right to Life Political Action Committee v. Bayless](#), 320 F.3d 1002 (9th Cir. 2003).
- 2 U.S.—[McIntyre v. Ohio Elections Com'n](#), 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).
- 3 U.S.—[Arizona Right to Life Political Action Committee v. Bayless](#), 320 F.3d 1002 (9th Cir. 2003).
- 4 U.S.—[Arizona Right to Life Political Action Committee v. Bayless](#), 320 F.3d 1002 (9th Cir. 2003).
- 5 U.S.—[McIntyre v. Ohio Elections Com'n](#), 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).
- 6 U.S.—[McIntyre v. Ohio Elections Com'n](#), 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).
- 7 U.S.—[American Civil Liberties Union of Nevada v. Heller](#), 378 F.3d 979 (9th Cir. 2004).
As to campaign contributions and expenditures, generally, see §§ 1107 to 1111.

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16B C.J.S. Constitutional Law § 1104

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

b. Regulation of Particular Activities

§ 1104. First Amendment protection for circulating or collecting petitions, initiatives, or referenda

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1683

The First Amendment's protection of speech includes the circulation of election petitions, initiative petitions, and ballot petitions.

The First Amendment's protection of speech includes the circulation of a ballot or initiative petition as involving a type of interactive communication concerning political change that is appropriately described as core political speech.¹ The First Amendment's protections are at a zenith as applied to such core political speech, requiring the application of exacting scrutiny for compelling state interests and narrowly tailored restrictions.² In the context of election petition solicitation and collection, the standard requires a substantial relation between the requirement and a sufficiently important governmental interest, and the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.³ That standard necessarily defeats a law requiring the disclosure of the names of petition signers,⁴ a requirement that circulators be registered

voters,⁵ a requirement that circulators be local residents,⁶ a witness residency requirement,⁷ a bar to receiving payment for the collection of election-related petitions,⁸ or a ban on payment for any other than a time-worked basis.⁹

The right to free speech is not implicated by a state's creation of a content-neutral ballot initiative and referendum procedure, reviewed particularly as to the state's single-subject and description-of-effect provisions, but is implicated only by the state's attempts to regulate speech associated with an initiative procedure; the statute is not subject to strict scrutiny in the absence of a direct effect on or involvement of one-on-one communications with voters.¹⁰

The right of access to private property for purpose of soliciting and collecting petition signatures depends on the status of the property under a forum analysis, and the absence of a public forum permits denying access.¹¹

Voter registration canvassing.

The minimal burden placed on First Amendment rights by a statute prohibiting the compensation of voter registration canvassers based on the total number of registered voters was reasonable in light of the State's interest in preventing voter registration fraud.¹²

CUMULATIVE SUPPLEMENT

Cases:

Ohio's municipal ballot initiative laws, which allowed a county board of elections to review proposed initiatives prior to the election, were not a prior restraint of speech, as would require heightened procedural safeguards in order to survive a First Amendment challenge; laws did not directly restrict core expressive conduct and instead regulated the process by which initiative legislation was put before the electorate, thereby having, at most, a second-order effect on protected speech. [U.S. Const. Amend. 1](#); [Ohio Const. art. 2, § 1f](#); [Ohio Rev. Code Ann. §§ 3501.11\(K\), 3501.38\(M\)\(1\)\(a\), 3501.39\(A\)\(3\)](#). [Schmitt v. LaRose](#), 933 F.3d 628 (6th Cir. 2019).

State constitutional provision outlining in-person procedure for collecting and verifying initiative petition signatures did not prevent political action committees (PAC) from engaging in core political speech with potential signers during COVID-19 pandemic, and thus did not violate First Amendment free speech clause as applied, even though PACs sought to use online signature gathering system; provision was reasonable, nondiscriminatory ballot access law that did not limit PACs' available pool of circulators, signature verification requirement did not restrict means that PACs could use to advocate proposals, it was COVID-19, not provision, that restricted circulators' ability to communicate with potential signers, and requirement of in-person signatures increased in-person communication. [U.S. Const. Amend. 1](#); [Ariz. Const. art. 4, part 1, § 1\(9\)](#). [Arizonans for Second Chances, Rehabilitation, and Public Safety v. Hobbs](#), 471 P.3d 607 (Ariz. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Meyer v. Grant](#), 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); [Nader v. Blackwell](#), 545 F.3d 459 (6th Cir. 2008); [Libertarian Party of Virginia v. Judd](#), 881 F. Supp. 2d 719 (E.D. Va. 2012), *aff'd*, 718 F.3d 308 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 681, 187 L. Ed. 2d 549 (2013).

- 2 U.S.—Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); Citizens in Charge v. Gale, 810 F. Supp. 2d 916 (D. Neb. 2011).
- 3 U.S.—Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).
- 4 U.S.—Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).
- 5 U.S.—Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999); Nader v. Blackwell, 545 F.3d 459 (6th Cir. 2008); Bogaert v. Land, 675 F. Supp. 2d 742 (W.D. Mich. 2009).
- 6 U.S.—Nader v. Blackwell, 545 F.3d 459 (6th Cir. 2008); Chandler v. City of Arvada, Colorado, 292 F.3d 1236, 13 A.L.R.6th 861 (10th Cir. 2002); Citizens in Charge v. Gale, 810 F. Supp. 2d 916 (D. Neb. 2011); Libertarian Party of Virginia v. Judd, 881 F. Supp. 2d 719 (E.D. Va. 2012), *aff'd*, 718 F.3d 308 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 681, 187 L. Ed. 2d 549 (2013).
- 7 U.S.—Lerman v. Board of Elections in City of New York, 232 F.3d 135 (2d Cir. 2000); Libertarian Party of Virginia v. Judd, 718 F.3d 308 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 681, 187 L. Ed. 2d 549 (2013).
- 8 U.S.—Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).
- 9 U.S.—Citizens for Tax Reform v. Deters, 518 F.3d 375, 40 A.L.R.6th 693 (6th Cir. 2008).
Ban on signature payment basis invalid
U.S.—Independence Institute v. Gessler, 936 F. Supp. 2d 1256 (D. Colo. 2013).
Ban on signature payment basis upheld
U.S.—Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006).
- 10 U.S.—Pest Committee v. Miller, 626 F.3d 1097 (9th Cir. 2010).
- 11 U.S.—Riemers v. Super Target of Grand Forks, Target Corp., 363 F. Supp. 2d 1182 (D.N.D. 2005).
- 12 U.S.—Busefink v. State, 286 P.3d 599, 128 Nev. Adv. Op. No. 49 (Nev. 2012).

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16B C.J.S. Constitutional Law § 1105

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

b. Regulation of Particular Activities

§ 1105. First Amendment protection of conduct at polling places; access to polling places

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 1692

The First Amendment guaranty of free speech and press applies to the restriction or regulation of speech or expressive conduct at, or access to, the polling or voting location.

The First Amendment guaranty of free speech applies to the restriction or regulation of speech or expressive conduct at the polling or voting location,¹ but a state has a compelling interest in preventing voter intimidation and election fraud at the polling place, and maintaining peace, order, and decorum in a polling place.² For the purpose of determining the applicable constitutional standard, a polling place is generally considered a nonpublic forum³ in which restrictions do not require strict scrutiny provided they are viewpoint neutral, reasonable in light of the purpose which the forum serves, and narrowly tailored to serve the state's legitimate interests.⁴ Reasonable restrictions may validly take the form of prohibitions against electioneering or campaigning, vote solicitation, or the display of campaign materials within a designated distance from the polling place.⁵ Prohibiting voters from wearing campaign paraphernalia into the polling place in order to cast their ballots does not run afoul of the First Amendment so long as the prohibition is reasonable and viewpoint neutral.⁶

Exit polling is protected speech under the First Amendment and a statutory ban on exit polling within certain distances of the polling place must be reasonable and narrowly tailored to the State's interests.⁷

Press access.

The applicability of the First Amendment right of free press in relation to polling places is subject to an "experience and logic" analysis for the right of press access to government proceedings; it requires a strict scrutiny standard for restrictions only if a right of access exists under that test and no such right of access is recognized for electoral polling places, as nonpublic forums, thus requiring only a reasonableness analysis under the First Amendment and permitting the exclusion of the press from polling places.⁸

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Footnotes

- 1 U.S.—*Anderson v. Spear*, 356 F.3d 651, 2004 FED App. 0025P (6th Cir. 2004); *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013).
- 2 U.S.—*Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013).
- 3 U.S.—*PG Pub. Co. v. Aichele*, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013); *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013).
- 4 U.S.—*PG Pub. Co. v. Aichele*, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013); *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013); *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 65 A.L.R.6th 787 (11th Cir. 2009).
- 5 U.S.—*Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013).
No Approach Zone of 100 feet
U.S.—*Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 65 A.L.R.6th 787 (11th Cir. 2009).
500 foot restriction overbroad
U.S.—*Anderson v. Spear*, 356 F.3d 651, 2004 FED App. 0025P (6th Cir. 2004).
300 foot restriction overbroad
U.S.—*Russell v. Grimes*, 53 F. Supp. 3d 1004 (E.D. Ky. 2014).
- 6 U.S.—*American Federation of State, County and Mun. Employees, Council 25 v. Land*, 583 F. Supp. 2d 840 (E.D. Mich. 2008).
- 7 U.S.—*Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988); *CBS Broadcasting, Inc. v. Cobb*, 470 F. Supp. 2d 1365 (S.D. Fla. 2006); *American Broadcasting Companies, Inc. v. Wells*, 669 F. Supp. 2d 483 (D.N.J. 2009).
- 8 U.S.—*PG Pub. Co. v. Aichele*, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013).

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16B C.J.S. Constitutional Law § 1106

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

b. Regulation of Particular Activities

§ 1106. First Amendment protection of ballot access

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1688

The First Amendment guaranty of free speech applies to questions of ballot access by candidates or initiatives.

The State's regulation of who can appear on a ballot inevitably affects free speech protected by the First Amendment.¹ The standard of review applicable to voting regulations on ballot access or candidate qualification—whether strict scrutiny or a lesser standard—depends on the character of the regulation and the magnitude of the asserted injury to protected rights.² A regulation imposes a severe speech restriction, requiring strict scrutiny, if it significantly impairs access to the ballot, stifles core political speech or dictates electoral outcomes.³ Restrictions that impose only a lesser burden on those rights are sustainable if reasonably related to the State's important regulatory interest since there is no fundamental right to run for office or to use the ballot to send a particular message.⁴ A regulation imposes a slight and permissible restriction on speech when it is generally applicable, evenhanded, and politically neutral, or if it protects the reliability and integrity of the election process.⁵

Age requirements, like residency requirements, and term limits, are neutral candidacy qualifications which the State has the right to impose, without violating the First Amendment.⁶ Ballot access or candidacy petition deadlines and sufficiency requirements are sustainable in the absence of a severe burden on First Amendment rights.⁷

A political party may require a party-nominee loyalty oath for placement on the party's primary ballot since the nature of the message is not compelled because the candidate may choose to say nothing or repudiate oath at the risk of losing party members' support.⁸

Write-in voting.

A state's prohibition on write-in voting is justified when there is ease of access to the State's ballots.⁹

Primary endorsement by political party.

A state's ban on primary endorsements by political parties constitutes a violation of the First Amendment right to free speech.¹⁰

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Footnotes

- 1 U.S.—[Pisano v. Strach](#), 743 F.3d 927 (4th Cir. 2014); [Lindsay v. Bowen](#), 750 F.3d 1061 (9th Cir. 2014).
- 2 U.S.—[Libertarian Party of Ohio v. Blackwell](#), 462 F.3d 579, 2006 FED App. 0342P (6th Cir. 2006).
- 3 U.S.—[Chamness v. Bowen](#), 722 F.3d 1110 (9th Cir. 2013).
- 4 U.S.—[Lindsay v. Bowen](#), 750 F.3d 1061 (9th Cir. 2014).
- 5 U.S.—[Chamness v. Bowen](#), 722 F.3d 1110 (9th Cir. 2013).
- 6 U.S.—[Lindsay v. Bowen](#), 750 F.3d 1061 (9th Cir. 2014).
- 7 U.S.—[Pisano v. Strach](#), 743 F.3d 927 (4th Cir. 2014).
- 8 U.S.—[Kucinich v. Texas Democratic Party](#), 563 F.3d 161 (5th Cir. 2009).
- 9 U.S.—[Burdick v. Takushi](#), 937 F.2d 415 (9th Cir. 1991), judgment *aff'd*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).
- 10 U.S.—[Eu v. San Francisco County Democratic Cent. Committee](#), 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989).

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